Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1982

NO. _____

UGBONE JOHNSON,
Petitioner

v.

J. RAY McDERMOTT & COMPANY, INC.,
McDERMOTT (NIGERIA), LTD.,
McDERMOTT OVERSEAS, INC.
and
OCEANIC CONTRACTORS, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether, in view of the Seventh Amendment to the Constitution of the United States, the Jones Act (46 U.S.C. 688) and Rule 12(b)(6), F.R.C.P., the district courts, in Jones Act jury cases brought by foreign plaintiffs against American or American controlled defendants in the federal district court, should apply Rule 56, F.R.C.P., to choice-of-law determinations at the pre-trial stage and defer over to the trial on the merits all genuine issues of material fact which are relevant to such determinations, as was done by the Third Circuit court of appeals in Chirinos v. Creole Corp., 613 F.2d 1240, 3rd Cir., 1980, or should the district courts make a final determination of such disputed issues at the pre-trial stage, as was done by the district court and affirmed

by the Fifth Circuit court of appeals, in this case.

II.

Whether the holding of the court of appeals in this foreign seaman Jones Act case that the basic tenets of Lauritzen v. Larsen, 345 U.S. 571 (1953), and Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), (wherein the court held that the nationality and base of operations of the owner and/or operator of the vessel and the flag of the vessel are controlling considerations in a choice-of-law determination) apply with minimum force tc foreign crew members of offshore drilling vessels, such as submersible drilling rigs, but apply with maximum force to American seamen upon such vessels and to foreign seamen upon "blue water" vessels, is erroenous and contrary to the Jones Act – particularly since the

vessel in question is American owned, American flagged, and the base of operations of the charterer is the United States – and/or constitutes discrimination against foreign seamen (as opposed to American seamen) and American owners of blue water vessels (as opposed to American owners of offshore drilling vessels), in violation of the equal protection clause of the Constitution of the United States (Fourteenth Amendment).

III.

Whether the courts should, in making the choice-of-law determination in a Jones Act case involving a foreign seaman, apply the "substantiality" test laid down by the Second Circuit in Bartholomew v. Universe Tankships, Inc., 263 F.2d 432, (2nd Cir. 1959), cert. den. 359 U.S. 1000 (1959), and adopted by the Supreme Court in Rhoditis, or apply the "balancing" or "preponderance" test as was done by the

district court, and affirmed by the Fifth Circuit, in this case.

IV.

Whether the district court and the court of appeals, in making the choice-of-law determination in this Jones Act case, should have ruled as a matter of law, in view of the undisputed facts - that the vessel was owned by an American corporation; the vessel flew the American flag; the vessel was operated pursuant to a bareboat charter by an American based corporation; the vessel was controlled by contracts which called for application of U.S., not Nigerian, law; the vessel was directed by supervisory personnel upon the vessel and in the owning and operating corporations who were all American citizens employed by American based corporations; the proceeds from the vessel's work ended up in Respondents' United States bank accounts

and the expenses of operating the vessel emanated out of Respondents' United States bank accounts; that the law of the suggested foriegn forum was grossly inadequate; and that the necessary defendant parties were not amendable to process in the suggested foreign forum - that there were substantial contacts between the United States and this vessel, its owner, operator and the enterprise in which it was involved and that United States law applies.

LIST OF ALL PARTIES TO THE PROCEEDING IN THE DISTRICT COURT AND CIRCUIT COURT

Petitioner:

Ugbone Johnson

Respondents:

J. Ray McDermott & Company, Incorporated
McDermott Overseas, Inc.
Oceanic Contractors, Inc.
McDermott (Nigeria), Ltd.

SPECIAL NOTE OF REFERENCES

J. Ray McDermott & Company, Incorporated, a Delaware corporation, will be referred to as "McDermott"; McDermott (Nigeria), Ltd., a Nigerian corporation, owned 60% by Maritime Overseas Corporation, will be referred to as "MNL"; McDermott Overseas, Inc., a Panamanian corporation and a wholly-owned subsidiary of McDermott, will be referred to as "MOI"; Oceanic Contractors, Inc., a Panamanian corporation, also wholly owned by McDermott, will be referred to as "Oceanic"; and Marine Contractors, Inc., a Panamanian corporation and wholly owned by McDermott, will be referred to as "MCI". These abbreviations were employed by the court of appeals. Two depositions were taken on the choice-of-law question of the officers of the McDermott companies, Peter Buchler,

hereinafter referred to as "Buchler Depo", and C. L. Davis, hereinafter referred to as "Davis Depo".

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY COURTS BELOW

1. The judgment and opinion of the district court was rendered in two opinions: the first was a memorandum and order dated August 22, 1979 in Cause No. H-77-1604, in the United States District Court for the Southern District of Texas, Houston Division (unreported), and the second was a memorandum and order, reaffirming the order of Aug. 22, 1979, in the same cause, dated November 13, 1980. The judgments and orders of the district court are attached as Appendices 1A-1B.

2. The judgment and opinion of the United States Court of Appeals for the Fifth Circuit, dated October 16, 1981, is unreported. The opinion and judgment of the Court of Appeals is attached as Appendix 2.

3. The order of the United States Court of Appeals, Fifth Circuit, denying Petitioner's Petition for Rehearing and Rehearing En Banc, dated December __, 1981. Said order is attached as Appendix 3.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Court of Appeals was entered on October 16, 1981 (Appendix 2). A timely Petition for Rehearing and Rehearing En Banc was denied on December 4, 1981 (Appendix 3). The jurisdiction of this Court is invoked under 23 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case involves directly and indirectly the construction and application of the following constitutional provisions, statutes and rules of procedure:

Amendments 7 and 14 to the Constitution of the United States; the Jones Act, 46 U.S.C. 688; and Rules 12 and 56 of the Federal Rules of Civil Procedure. These all are reprinted in pertinent part and attached as Appendices 4A-4E.

STATEMENT OF THE CASE

A. Course of the Proceedings Below.

Suit was filed in this case by Ugbone Johnson, as Plaintiff (Petitioner), alleging that while he was a seaman on-board the vessel DERRICK BARGE 24 he was injured and suffered substantial damages as the result of the negligence of the Defendants, their agents, servants and employees and/or the unseaworthiness of the vessel. Petitioner sued McDermott, which is an American corporation with its home office in New Orleans, Louisiana and with one of its main offices in

Houston, Texas. McDermott was the owner of D.B. 24 at the time of the accident and said vessel flew the American flag. Petitioner was a Nigerian who was titularly employed by MNL, a Nigerian subsidiary of McDermott. Respondents contended that the vessel in question was bareboat chartered to Oceanic, a Panamanian corporation, also a wholly-owned subsidiary of McDermott. Oceanic had offices all over the world but had its home office in New Orleans and no office in Nigeria.

The district court sustained the motion of McDermott for dismissal on grounds of forum non conveniens and sustained the Rule 12(b)(1) motions of Oceanic, MCI and MNL (MOI was not sued) on the ground that the court did not have in personam jurisdiction over those Defendants. The district court found that the law of

Nigeria applied to the controversy. The court of appeals affirmed solely on the ground of forum non conveniens and did not reach the question of in personam jurisdiction.

B. Evidence Relevant to Choice-of-Law Question.

(1) The Principal, Relevant Personnel of the McDermott Companies.

C. L. Graves, R. K. Richie and J. E. Cunningham are three of the five active members on the board of McDermott, the only three members of the board of Oceanic, MCI and MOI, and Graves and Richie are two of the board members of MNL; all are officers in one or more of said corporations (Ex. 3, 14-18 to Davis Depo). J. W. McCarte was Group Vice President of Oceanic in charge of operations in West Africa, Chairman of the Board of MNL, Vice President of MOI and Vice President of MCI (Ex. 3, 17 & 18 of Davis Depo; pp. 22-24 of Davis Depo).

Either A. W. Ray or Jesse Martin Ashbaugh was managing director of MNL (Ex. 18, Davis Depo; Rec. 131) and James Arcie Martin was barge foreman of D.B. 24 (see contract, Ex. 13 to Davis Depo).

The evidence establishes throughout that all of the above persons were Americans (testimony of Buchler throughout his depo; Davis from pp. 6-48 of his depo); that Graves, Cunningham, Richie and McCarte had their home offices in New Orleans, La. (Davis Depo, pp. 9, 10, 14, 15, 18, 22, 40-48, 62; Buchler Depo, pp. 9-24); and that the barge superintendent, James A. Martin, had his permanent home in Columbus, Ga. (Ex. 13 to Davis Depo). For an illustration of how that small group of Americans controlled McDermott, Oceanic, MCI, MOI and MNL, please see Appendix 5, pictorial chart, attached hereto.

While all of said employees were titularly employed and paid by Oceanic and/or MCI, and none were titularly employed or paid by MNL (Davis Depo, pp. 161-163; Ex. 13 to Davis Depo), McDermott considered these and all of the McDermott companies' officers and employees as its own, as indicated in its consolidated financial statement (Ex. 3, Davis Depo) and its 10K statement (Ex. 4, Davis Depo), particularly p. 7, where McDermott states that the 20,953 worldwide officers and employees of the McDermott companies were under "its direct supervision".[1/]

1/ It is undisputed that the McDermott personnel were shifted from subsidiary to another (pp. 59, 60, 123, 124 of Davis Depo; ans. to interrogatories in Oke v. J. Ray McDermott, No. 36, 36b, Appendix 4), and the transferred employees retained their right to participate "in employee benefit plans of the parent". (Ans. 36b, Doc. 58, "Loose in File".)

(2) Control of Vessel, DERRICK BARGE 24.

The DERRICK BARGE 24 was owned by the Delaware corporation, McDermott, was registered in the United States, and flew the American flag (ans. to interrog. 1, Rec. 76; depo. of Peter Buchler, p. 51; affidavit of Ashbaugh, para. 10, Rec. 132; affidavit of Miciotti, officer of Oceanic; Rec. 125). The Respondents contended that at the time of the accident in question, D.B. 24 was under a bareboat charter agreement executed November 14, 1965 between McDermott and Oceanic (ans. to interrog. 3, Rec. 76, 77; bareboat charter, Rec. 98, 101; Miciotto's aff., Rec. 125-130; aff. of Ashbaugh, Rec. 132).

While Oceanic was a Panamanian corporation with offices in many places around the world, its home office and base of operations was in New Orleans, Louisiana and it had no employees, office,

officers, assets or any kind of presence in Nigeria and no operating office in Panama.[2/]

[2/] Ex. 3, Davis Depo; Richie, the President and the three board members were all Americans who lived and officed in New Orleans, Louisiana; Ex. 8, Davis Depo; pp. 14-15, 18, Davis Depo; pp. 9, 24, 25, 41, Buchler Depo; Oceanic bylaws, pp. 3-5; Buchler testified that "the Board of Directors of Oceanic Contractors, Inc. manages the business and affairs of Oceanic Contractors," p. 39, Buchler Depo; Davis testified that the President of Oceanic "carried out his duties for Oceanic Contractors . . . while living in New Orleans," p. 9, Davis Depo; also pp. 10-30, Davis Depo; p. 22, Ex. 4, Davis Depo; John McCarte handled West Africa, including Nigeria, for Oceanic and he did so out of his New Orleans office, Davis Depo, pp. 22-24; evidence re no office in Nigeria, p. 28, Davis Depo; p. 30, 42, 142, Davis Depo; no employees in Nigeria, p. 28, Davis Depo; p. 34, Buchler Depo; no bank accounts in Nigeria but with bank accounts in U.S., Davis Depo, pp. 123, 130; and no agent for service in Nigeria, p. 35, Davis Depo; re no office in Panama, p. 42, Buchler Depo; and other evidence re base of operations in New Orleans, p. 19, Davis Depo; pp. 9, 24, 25, 41, Buchler Depo.

The consolidated financial statements and 10K reports of McDermott state that McDermott (not MNL or Oceanic) owned and operated D.B. 24 (p. 17, Ex. 1 to Davis Depo). D.B. 24 worked in Brazilian waters in 1974, before being sent to West Africa (p. 17, Ex. 1, Davis Depo). In answer to Interrogatory No. 10, Respondents stated that Oceanic (not MNL) "was responsible for . . . keeping the vessel DERRICK BARGE 24 and all of its equipment in a seaworthy condition." The log book of the D.B. 24 was kept in Brussels, not Nigeria (Rec. 88, 89). The investigation of the accident in question was conducted by Insurance Company of North America (INA, American company) out of Brussels, not Nigeria, and the investigative report was maintained only in New Orleans, not Brussels or Nigeria (Rec. 83).

(3) Contracts Relevant to Control of DERRICK BARGE 24.

The bareboat charter agreement between McDermott and Oceanic indicates clearly that one of the purposes of the chartering agreement was to comply with I.R.S. regulations (Davis Depo., Ex. 9 to Answers to Interrogatories, Rec. 98-101 and to Affidavit of Miciotti, Rec. pp. 127-130, Para. 2 of the Charter Agreement). The charterer agreed to maintain insurance on the vessel (para. 3, bareboat charter agreement) and this insurance was placed with Insurance Company of North America (ans. to interrog., No. 19, Rec. 82).

The bareboat charter was cancellable by either party and if cancelled by McDermott, Oceanic was required to redeliver the vessel "at the Company's shipyard located near Morgan City,

Louisiana" (para. 5, charter agreement). Under the charter agreement "all notices provided for herein shall be addressed in the case of the Company (McDermott) to it at P. O. Box 60035, New Orleans LA 70160, Attention: John D. Dupuy, and in the case of the Charterer (Oceanic), to it at P. O. Box 61961, New Orleans LA 70160, Attention: Mr. L. B. Smith" (p. 8, bareboat charter).

Most importantly, the charter agreement provided that "this Agreement shall be governed by and interpreted in accordance with the General Maritime Laws of the United States" (para. 11) and that "performance pursuant to this Agreement is conditioned on obtaining prior approval from the United States Maritime Administration" (para. 12). Also, both McDermott and Oceanic could limit liability "as set forth in 46 U.S.C. Sections 183-187" (para. 10). The agreement

was executed in New Orleans by John A. Lynott, Treasurer of McDermott on behalf of the Company,[3] and by R. K. Richie, President of Oceanic on behalf of the Charterer. It was attested to by the same person on behalf of both corporations, Mr. Louis B. Sierra, Secretary of McDermott and Assistant Secretary of Oceanic (see last page, charter agreement). Lynott, Richie and Sierra all officed in New Orleans.

The employment contract of Martin, the barge superintendent, who directed the day-to-day activities of the barge, states that he was employed by MCI and MOI, not MNL, and that he would receive workmen's compensation benefits "at least equal to the Workmen's Compensation Law of the State of Louisiana" (Ex. 13,

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[3] Lynott was also listed as having "drafted and negotiated the bareboat charter agreement" (ans. to interrog. 3, Rec. 82).

Davis Depo).

(4) The Alter Ego Dominance of McDermott Over its Subsidiaries, Particularly MNL.

According to McDermott's consolidated financial statements and 10Ks, the Articles of Association of MNL, and the minutes of the Board of Directors meetings of MNL, McDermott, not MNL, owned and operated the "fabrication facility at Warri" and the offices in Lagos and Warri; McDermott guaranteed the debts of its subsidiaries,[4/] including MNL's

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[4/] McDermott also furnished the equipment, most of it from its fabrication yard in Morgan City, Louisiana, which was used by its subsidiaries (p. 4, 10K, Ex. 4 to Davis Depo; Ex. 1, 2 & 3, Davis Depo); supplied research, engineers and engineering services to its subsidiaries (pp. 4, 7, Ex. 4 of Davis Depo); provided pension, profit sharing and retirement plans for the employees of the subsidiaries (p. 28, Ex. 1, Davis Depo; p. 39, Ex. 2; p. 39, Ex. 3; pp. 37, 38, Ex. 4 to Davis Depo); furnished general liability, builder's risk and workmen's compensation for its subsidiaries (p. 6, Ex. 4 to Davis Depo); and

"floating notes payable"; MNL's "net book value" and "operations" were considered "immaterial" by McDermott; the board of MNL was controlled by Americans sitting in New Orleans; and the minutes of MNL's board meetings reflected now MNL made no executive decisions, was totally dominated by McDermott and was nothing more than an employment agency for inexpensive, unskilled Nigerian labor (Ex. 1-5, 18 & 19 to Davis Depo; p. 1, Ex. 5; pp. 4-6, Ex. 3; pp. 5, 10, 11 of Ex. 19; pp. 1, 5 of Ex. 1; p. 24, Ex. 2, Davis Depo; re MNL debts, p. 34, Ex. 3; p. 36, Ex. 2; p. 32, Ex. 4; p. 45, Ex. 4 of Davis Depo; re immateriality of MNL, p. 40, Ex. 2, Davis Depo; p. 38, Ex. 4, Davis Depo).

4/ (cont'd)
provided advertising, maintenance and repairs, group hospitalization, and overall research and development to its subsidiaries (p. 48, Ex. 4 to Davis Depo; pp. 110-112, 118-121, 124, 125, 127, 128 and 160, Davis Depo).

(5) Facts re Failure of Justice.

The Respondents established that Petitioner, under Nigerian law, could receive no more than workmen's compensation benefits, and the evidence produced by the Respondents indicates that these benefits are grossly inadequate. (Affidavit of Leggett)[5](App. 6), under Nigerian law, the maximum recovery by a widow and her children is N3,200, approximately $3,500 U.S. Moreover, Nigeria has no case reporting process and has a very uncertain and tenuous system of justice (App. 6).

The Respondents offered no evidence as to what the procedural, discovery and due process rules are in Nigeria (see entire record) and it was undisputed that none of the Respondents or potential Respondents (McDermott,

[5] A total payment, in final satisfaction of the case of a Nigerian seaman who lost his leg (see citations to

MOI, Oceanic and MCI),[6] with the exception of MNL, had any business, office, assets or agent for service in Nigeria.

C. Basis for Federal Jurisdiction in the District Court.

The basis for jurisdiction in the district court was the Jones Act and the general maritime law of the United States.

REASONS RELIED ON FOR THE ALLOWANCE OF WRIT

I.

THIS CASE IS OF MOMENTOUS SIGNIFICANCE; THERE IS A DESPERATE NEED FOR THE SUPREME COURT TO RESOLVE AND CLARIFY SERIOUS CONFLICTS BETWEEN THE CIRCUIT COURTS AND IMPORTANT CONSTITUTIONAL AND JONES ACT QUESTIONS THAT HAVE ARISEN OUT OF THE USE BY AMERICAN AND AMERICAN CONTROLLED COMPANIES, IN THE RAPIDLY GROWING OFFSHORE EXPLORATION INDUSTRY, OF THOUSANDS OF FOREIGN SEAMEN.

5/ (cont'd) record, supra) of 2,240 Naira (about $2,250.00 U.S.; the exchange rate is $1.02 to the Naira; see Appendix 6).

6/ One or more of them could be found to have been the Jones Act employer of the decedent. See Spinks v. Chevron, 507 F.2d 616 (5th Cir. 1975).

The number of offshore workers and seamen in the world was estimated in 1980 at 350,000.[7] The percentage of those that are foreign has increased dramatically in the last nine years because of the tremendous shift from domestic offshore drilling to offshore drilling in foreign waters.[8]

Working in offshore petroleum exploration is one of the most dangerous occupations in the world.[9] The foreign

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[7] Blood and Oil, "The Peril of Offshore Petroleum Production", by Ross Milloy, The Progressive, March 1980.

[8] Milloy, Id. In 1962, almost 92 percent of all mobile offshore drilling rigs in the world operated off the American coastline but by 1976 over 64% were operating off foreign coastlines.

[9] See injury statistics in the Hearings on HR 6705, a Bill to Exclude Foreign Seamen on Offshore Oil Exploration Vessels from the Benefits of the Jones Act, Subcommittee on Merchant Marine of the Committee on Merchant Marine and Fisheries of House of Representatives, Ninety-Sixth Congress, pp.

workers who are injured and their survivors when killed are generally entitled to only token and grossly inadequate compensation benefits in their native countries,[10] while the offshore companies, most of which are American,[11] continue

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9/ (cont'd)
197-286 of Serial No. 96-39, U.S. Govt. Printing Office. Also Milloy, Id; the British Medical Association reports that offshore workers' fatalities are ten times greater than in coal mining (previously the most hazardous category).

10/ Milloy, Id. and Affidavit of Leggett (on Nigerian law) (see App. 6), and see discussion, infra.

11/ Milloy, Id., noted:
"The industry is dominated by American corporations working under subcontracts for the major oil companies. Most of the product is purchased by U.S. multinationals (in various venture combinations), most rigs are owned and operated by American companies, most contracting companies are American-owned, most patents are held by American manufacturers, and most of the machinery is sold by American dealers."

to make tremendous profits from their foreign offshore exploration.[12/]

The trend toward greater offshore activity, thus a greater number of foreign seamen who will be directly and invitally affected by the decision in this case, is self-evident. All American seamen will be indirectly affected for the reasons discussed at the Congressional hearings on H.R. 6705; if the foreign seamen are denied access to American law, the adverse effects upon safety and the hiring of American workers (because of the tremendous economic advantages, from a legal standpoint, of hiring non-American seamen) are obvious.[13/]

[12/] Merchant marine hearings, Id., statement by Prof. Jenkins, pp. 260-264; Milloy, Id.

[13/] Merchant Marine hearings, Id., pp. 262, 263; Milloy, Id.

While the offshore drilling and oil companies argue that non-Americans on American offshore rigs should not be given rights under American laws because otherwise the American companies are placed at a competitive disadvantage by having to pay liability premiums to cover the non-Americans, they wholly failed to demonstrate such a disadvantage at the hearings on H.R. 6705 in 1980 and on the successor bill, H.R. 4863.[14/] As a matter of fact the evidence is almost conclusive that such an alleged disadvantage

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14/ H.R. 6705 never got out of committee. Hearings on H.R. 4863, pending in the present Congress, were held on Feb. 25, 1982 and representative of the McDermott Respondents, testified on behalf of the bill. Lord Justice Shaw, in Castanho v. Brown & Root (U.K.) Ltd., 3 All England Reports 72 (1980), see the American counterpart decision, Castanho v. Jackson Marine, Inc., et al, ____ F.Supp. ____ (E.D. Tex. 1980) mandamus to dismiss on grounds of forum non conveniens denied 650 F.2d 546

is a myth.[15] In any event, it is revealing that the Respondents and other American offshore drilling companies, who so eagerly seek the passage of H.R. 4863, seem to manifest agreement with your Petitioner that the courts should apply American law as mandated by the Supreme Court in Rhoditis and Lauritzen and

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14/(cont'd)
(5th Cir. 1981), rejected the notion that American companies suffer a significant disadvantage as a result of liability to non-American seamen, stating:

> "American corporations, like their insurers, are aware of the scale of damages in the United States and they arrange their policies and the premiums accordingly." (2 ALL ER at 90).

15/ A Newfoundland official, when told that the American offshore drilling companies were at a competitive disadvantage because their foreign crewmen may be entitled to the protection of American law, sarcastically replied that he guessed that was the reason all the offshore drilling in Newfoundland was being done by American companies (Mobil, ODECO, Zapata and Sedco). Hearings, Feb. 25, 1982 on

leave any radical new theories, such as giving a special and limited group of vessels partial immunity from the Jones Act, to the Congress (see decision under IV infra).

While we recognize that moral considerations generally have only remote relevance to a legal determination, we cannot help but observe that, when the right and wrong of this matter is considered, it is clearly wrong to say to a foreign offshore worker that he must work side by side with the American workers, both exposed to the same ultrahazardous risks,

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15/ (cont'd)
H.R. 4863 (written report not yet issued). The Hearings on H.R. 6705, id. Ftnte 9, revealed, from the drilling companies own list of the number of suits by their foreign employees, and the premium cost statistics, that any additional premium costs relative to gross income and profits simply is not significant.

both helping produce tremendous profits for American or American controlled corporations, that when he gets maimed or killed, he or his survivors will be relegated to totally inadequate workmen's compensation benefits (as in Nigeria) while his American counterpart, or his survivors, will be entitled to the just and adequate benefits of American law.[16/]

[16/] The testimony of Stephen Neary, member of the Newfoundland House of Delegates, before the Merchant Marine Subcommittee that the people of Newfoundland vehemently oppose H.R. 4863 as discriminatory, seems typical of the reaction around the world toward judicial or legislative limitations upon the rights of non-Americans working for American owned or controlled companies.

In the meantime, the courts are in disarray over the handling of the choice-of-law question in these foreign seaman Jones Act cases.[17] This question is of threshold importance in Jones Act cases brought by foreign seamen because the American defendants invariably file motions to apply foreign law and then to dismiss on grounds of forum non conveniens. All the circuits have consistently

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[17] A good example can be found in the decisions of two other district courts, in addition to the district court in this case, with regard to three different Nigerian seamen involving basically the same choice-of-law facts. John Ikesume v. J. Ray McDermott, Cause No. H-77-1706, U.S.D.C., S.D. Tex., 1980, attached as App. 7, where the district court applied U.S. law; and Oke v. J. Ray McDermott, Cause No. S-78-19-CA, U.S.D.C., E.D. Tex., attached as App. 8, where the district court deferred the choice-of-law question. One of the most disturbing consequences of the court of appeals decision in this case is that - when confronted with the seeming conflict between Chiazor v. Transworld Drilling

held that if the court decides that U.S. law applies, then the court has no discretion to dismiss on grounds of forum non conveniens; it must deny the forum non conveniens motion.18/

II.

A CONFLICT BETWEEN THE CIRCUIT COURTS HAS ARISEN OVER THE PROCEDURAL HANDLING OF THE FACTUAL ISSUES INCIDENT TO THE CHOICE-OF-LAW QUESTION AT THE PRE-TRIAL STAGE, AND SUCH MATTER URGENTLY NEEDS TO BE CLARIFIED AND RESOLVED.

17/(cont'd) 648 F.2d 1015 (5th Cir. 1981), petition for cert. pending, No. _____, Supreme Court; Castanho v. Jackson Marine, Inc., supra; and the three McDermott cases mentioned above – the court simply let the cup of decision pass and opened the door to forum shopping, when it stated that "each case also reflects the latitude which this court has accorded the discretion of the trial judge in deciding whether to grant or deny such a (choice-of-law and forum non conveniens) motion." (See Ftnt. 1, p. 3 of op. App. ___).

18/Fifth Circuit: Fisher v. Agios, 528 F.2d 308 (5th Cir. 1980); Third Circuit: Demateos v. Texaco, Inc., 562

The Third Circuit, in Chirinos, articulates, we submit, the correct approach to a choice-of-law determination at the pre-trial stage. In that Jones Act case involving foreign seamen the defendants filed a motion to dismiss for lack of subject matter jurisdiction, for failure to state a claim and on grounds of forum non conveniens (basically the same motions filed in this case). The plaintiffs contended that the subject matter jurisdiction and failure to state a claim motions both turned on whether U.S. or foreign law applied and therefore, in accordance with Rule 12(b)(6), F.R.C.P.,

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18/(cont'd)
F.2d 895 (3rd Cir. 1977) cert. den. 435 U.S. 904 (1978); Second Circuit: Bartholomew v. Universe Tankships, Inc.; Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307 (2nd Cir. 1976).

had to be treated as a motion for summary judgment under Rule 56, F.R.C.P.[18a] The court agreed with plaintiffs and after first noting that the assertion of a claim under the Jones Act was sufficient, in itself, "to empower the District Court to assume jurisdiction over the case and determine whether, in fact, thd Act (Jones Act) does provide the claimed rights",[19] stated:

[18a] Rule 12(b)(6) provides that if matters other than the pleadings are presented (such as affidavits, depositions, etc.) then the court must handle the matter "as one for summary judgment . . . disposed of . . . a provided for in Rule 56." Judge Clark "suggested . . . early in the history of the federal rules that the summary judgment motion should encompass and supersede all other motions and become the primary procedure for making objections in advance of the answer." Federal Practice and Procedure, Wright and Miller, Vol. 5, Sec. 1342, p. 508, citing Clark, Simplified Pleading, 1942, 2 F.R.D. 456, 27 Iowa L. Rev. 272.

> "The District Court stated that therefore 'the controlling question is whether the Jones Act and the United States general maritime law' are applicable. Thus, the District Court's decision was principally concerned with whether the Plaintiffs were entitled relief under United States law, and as such, it was in the nature of a decision on a motion for summary judgment. Therefore, all factual disputes and inferences are to be resolved favorably for the Plaintiffs. Addickes v. S. H. Kress and Co., 398 U.S. 144, 158-159, (1970); Wright, Law of Federal Courts, Section 99 (2nd Ed. 1970." (Emphasis ours, 613 F.2d 1343-1344).

Judge Van Graafeiland of the Second Circuit, in his dissent in Antypas v. Cia Maritima San Basilio, S.A., 541 F. 2d 307 (2nd Cir. 1976), agreed:

> "Although challenges to Jones Act coverage are usually by motion to dismiss for lack of subject matter jurisdiction, Gilmore & Black, The Law of Admiralty, 481 (1975),

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19/ Citing Lauritzen and Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).

> appellees' motion below was for summary judgment. Whatever the form of the motion, it was not the proper medium for deciding disputed questions of fact. Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 979 (2nd Cir. 1975); Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1319 (2nd Cir. 1975). The facts either warrant the application of the Jones Act or they do not, Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 443 (2nd Cir.) cert. denied 359 U.S. 1000 (1959); and the resolution of disputed questions of fact is for the trial. Rodriguez v. Solar Shipping, Ltd., 169 F.Supp. 79 (S.D. N.Y. 1958). In my opinion, it is as erroneous to hold, on the basis of disputed pre-trial affidavits, that appellee's duties are fixed by the Jones Act as it would be to hold that they are not." (541 F.2d at p. 311; emphasis ours).[20]

Both the district court and court of appeals in this case took precisely the

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[20] The majority held that as a matter of law U.S. law applied, but there was nothing in the majority opinion which was contrary to Judge Van Graafeiland's procedural observations.

opposite approach; they disregarded Rule 12(b)(6) and 56 and utilized their discretion[21] to finally resolve both motions, even though disputed factual issues were clearly present. While the use of discretion is permissible in resolving a forum non conveniens motion, Gulf Oil v. Gilbert, 330 U.S. 501 (1953) and Piper Aircraft v. Reyno, 50 USLW 4055 (Sup. Ct. Dec. 8, 1981), a choice-of-law determination "is not a matter resting in the discretion of the trial judge." Bartholomew, 263 F.2d at p. 443.

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[21] The same approach was taken in Chiazor. The district court in Chiazor never mentioned choice-of-law and obviously lumped the two determinations together and used its discretion to resolve both. The court of appeals held that the proper standard of review of the district court's determinations (forum non conveniens and choice-of-law) was whether the district court's decision "constituted a clear abuse of discretion" (648 F.2d at 1017).

Many facts deemed relevant to the choice-of-law determination by the courts in such cases as Lauritzen, Rhoditis, Fisher v. Agios, 528 F.2d 308 (5th Cir. 1980) cert. den. ____ U.S. ____, and Castanho v. Jackson Marine, Inc.,[22/] were resolved by the district court and court of appeals in this case, to-wit: (a) whether MNL was the alter ego of its parent and grandparents, which were American corporations or corporations indisputedly based in the United States; (b) whether the base of operations of the operator of DERRICK BARGE 24 was the United States of America; the district court and court of appeals said it was in "Brussels, Belgium or Lagos, Nigeria" when the great preponderance of the evidence established it was in the United States; (c) whether the general enter-

[22/] Base of operations is normally a fact question, Fisher v. Agios, as is the question of alter ego, Davis v. Alexander, 265 U.S. 115 (1925); Garden

prise of the respondents, involving the offshore drilling in Nigeria, had substantial contacts or connections with the United States; (d) whether the overall "day-to-day operations" were in fact being conducted from Nigeria or, in fact, being directed and conducted from the United States; (e) whether the vessel's activities were controlled by the Nigerian subsidiary, MNL; and (f) whether DERRICK BARGE 24 "had significant operational contacts with the United States".

The record in this case makes it quite obvious that there exists at least a hotly disputed fact question concerning all these issues.[23]

22/(cont'd) City v. Burden, 186 F.2d 652 (10th Cir. 1951).

23/Of course, the court of appeals was erroneously approaching these issues as if the district court had been the final arbiter of the facts, with the

Since such issues were disputed,[24] Respondents' motion to apply Nigerian law and for forum non conveniens should have been denied at the pre-trial stage, and the failure of the Fifth Circuit Court of Appeals to so hold constitutes a serious split between the circuit courts

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23/ (cont'd)
right, as a jury would have, to accept one version or the other where the evidence is in dispute. But that is the point: there is, without any question, at least "geniune issues of material facts" present here. The evidence on alter ego is voluminous: the parent ran the subsidiaries, particularly MNL, through three common directors and officers; financed the subsidiaries and assumed their obligations; exchanged employees and assets with control retained in the parent; considered them "immaterial" from a profit and loss point of view; considered the assets and employees as those of the parent; and completely dominated the subsidiaries through centralization of operations in New Orleans. The evidence concerning base of operations focuses upon McDermott, the owner of the assets, and Oceanic, the alleged operator of the vessel; the evidence is clear that both McDermott and Oceanic were run out of New Orleans.

and amounts to such a departure from the explicit provisions of the Federal Rules of Civil Procedure that the exercise of this Court's power of review is urgently needed.

24/ As emphasized by this Court in Addickes, the moving parties (Respondents here) had the heavy burden of showing an absolute absence of a genuine issue as to any material fact (398 U.S. at pp. 1609, 1610). Moreover, this Court has further cautioned against summary disposition of cases when "the proof is largely within the hands of the Defendants (proponents)." Poller v. C.B.S., 368 U.S. 464 (1962). In these choice-of-law situations, the defendants create all the relevant facts: the corporate structures, the vessel relationship to those entities; the personnel who control the vessel and the relevant corporate entities and the structure of the enterprise in which the vessel is involved. They generally have in their possession all the evidence pertaining to these matters.

III.

THE FAILURE TO ALLOW THE PLAINTIFF A TRIAL BY JURY ON THE DISPUTED FACT ISSUES RELEVANT TO THE CHOICE-OF-LAW QUESTION IS CONTRARY TO THE JONES ACT AND VIOLATES THE SEVENTH AMENDMENT.

The Seventh Amendment guaranteeing the right of trial by jury applies to civil cases and is a right so "fundamental and sacred" that it "should be jealously guarded by the Court." Jacob v. City of New York, 315 U.S. 752, 753 (1942). As to the Jones Act, which expressly provides the seaman with "the right of a jury trial", in Ferguson v. Moore-McCormick Lines, 252 U.S. 521 (1957), this Court held "the jury . . . plays a pre-eminent role in these Jones Act cases."[25/]

25/ In Hampton v. Magnolia Towing Company, 338 F.2d 303 (5th Cir. 1964), the court stated that the "Jones Act proffers this right (the right of trial by jury) and we exercise the greatest caution in denying it to any litigant."

In this case, the Petitioner requested a trial by jury. A seaman is just as much entitled to have the jury he has requested pass upon the disputed fact issues incident to the choice-of-law question as he is to have them pass upon the issues of seamen's status,[26] alter ego[27] and maintenance and cure.[28]

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[26] Offshore Company v. Robison, 266 F.2d 769 (5th Cir. 1959), where the court stated:

> "Attempts to fix unvarying meanings have (sic) a firm legal significance to such terms as seaman, vessel, and member of a crew must come to grief on the facts. These terms have such a wide range of meaning, under the Jones Act as interpreted in the courts, that, except in rare cases, only a jury or trier of facts can determine their application in the circumstances of a particular case."

[27] Davis v. Alexander, supra, and Garden City v. Burden, supra.

[28] Fitzgerald v. U.S., 374 U.S. 16 (1963).

The denial of a jury trial on the fact issues incident to a choice-of-law determination is a clear breach of the Seventh Amendment and the plain language of the Jones Act. If the decision of the court of appeals in this case is allowed to stand, the door would be open to further encroachment upon this sacred right.[29]

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[29] In Fitzgerald v. U.S., supra, Footnote 30, this Court noted: "Where, as here, a particular mode of trial being used by many judges is so cumbersome, confusing and time consuming that it placed completely unnecessary obstacles in the paths of litigants seeking justice in our Courts, we should not and do not hesitate to take action to correct the situation. Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments. . . and the jury, a time-honored institution in our jurisprudence, is the only tribunal . . . . to try all the claims" (374 U.S. at p. 21, emphasis ours).

IV.

THE CONSISTENT PATTERN OF THE COURTS TO APPLY U.S. LAW TO CASES BROUGHT BY U.S. CITIZENS FOR INJURIES SUSTAINED ON OIL EXPLORATION VESSELS OPERATED OVERSEAS BY AMERICAN CONTROLLED COMPANIES BUT NOT TO APPLY IT TO CASES BROUGHT BY NON-AMERICANS INVOLVING THE SAME CIRCUMSTANCES, IS CONTRARY TO THE JONES ACT AND VIOLATES THE EQUAL PROTECTION CLAUSE OF THE CONSTITUTION.

We concede that Mr. Justice Jackson and the Court specified in Lauritzen that the nationality of the seaman is a relevant element in deciding the choice-of-law question and we are aware that the Court recently, in Piper Aircraft v. Reyno, supra, a case involving a non-maritime accident, emphasized the foreign nationality of the plaintiff in connection with a forum non conveniens motion. However, we believe that when the single distinguishing element between the application or non-application of U.S. law is the fact that the seaman is or is not

foreign,[30] then the Equal Protection Clause is violated, and the Jones Act is contravened.

Foreigners are "persons" within the meaning of the Equal Protection Clause of the 14th Amendment. Graham v. Richardson, 403 U.S. 365 (1971).[31]

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[30] We have searched diligently but find no case where an American seaman working on an American controlled rig overseas has been denied American law. The court of appeals in this case stated specifically that the nationality of the seaman was significant (648 F.2d pp. 1018, 1019).

[31] And see Farrand, The Framing of the Constitution (1913), at 79, 119. As Alexander Hamilton in the Federalist Papers, No. 80, so eloquently put it:

> "...the federal judiciary ought to have cognizance of all causes in which citizens of other countries are concerned. This is no less essential to the preservation of the public faith than to the security of the public tranquility. . ."

Also see Sugarman v. Bougall, 413 U.S. 634 (1973), where a blanket denial of aliens of the right to hold competitive civil service positions was held to violate equal protection guarantees.

The Jones Act provides the same rights to a foreign seaman as it does to an American seaman. Kyriakos v. Goulandris, 151 F.2d 132 (2nd Cir. 1945).[32]

As stated by the court of appeals in the Rhoditis case,[33] "(m)aritime allegiance is not to be defined in a patriotic, nationalistic or chauvinistic sense,

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[32] The court stated:

> "When Congress used the word 'seaman' in the Jones Act it employed a word of general application, embracing men of any nation who sail the seas. Had it wished to limit the application of the statute to seamen of American citizenship or residence, the words to effectuate the limitation were at hand. The legislators did not see fit to use them . . . instead, it appears evidence that Congress deliberately chose to leave the word 'seaman' its full and unrestricted meaning applicable to aliens and Americans alike . . ." (id. at p. 137).

[33] 412 F.2d 919, aff'd. 398 U.S. 306 (1970).

but in terms of economic ties" (412 F.2d at p. 926).[34] This Court should, we submit, exercise its power of review because of the traditional importance of strongly enforcing the Equal Protection Clause[35] and the need to assure the application of the remedial Jones Act to all within its legislatively intended purview, regardless of nationality or race.

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[34] The distinction between American and foreign seamen in the choice-of-law situation is also contrary to the announced policy of the United States in ratifying the Shipowner's Liability (Sick and Injured Seamen) Convention of 1936, which provides in Article XI:

> "This convention and national laws or regulations relating to benefits under this convention shall be so interpreted and enforced as to ensure equality of treatment of all seamen irrespective of nationality, domicile or race" (Hearings on H.R. 6705, id. at p. 263).

[35] As stated by Prof. Jenkins before the House Subcommittee, the bill offered there, which attempted (unsuccessfully thus far) to legislate precisely what the court of appeals in this case has

V.

THE COURT OF APPEALS DECISION ALSO CONTRAVENES THE JONES ACT WHEREBY IT APPLIES CHOICE-OF-LAW STANDARDS TO OIL DRILLING VESSELS DIFFERENT THAN THOSE IT WOULD APPLY TO BLUE WATER VESSELS AND SUCH DECISION DISCRIMINATES AGAINST AMERICAN OWNERS, PARTICULARLY SINCE D.B. 24 IS AMERICAN OWNED AND AMERICAN FLAGGED, OF BLUE WATER VESSELS SINCE THEIR FOREIGN SEAMEN CONTINUE TO HAVE ACCESS TO THE JONES ACT.

The extremely superficial distinction employed by the court of appeals in this case, through its adoption of the rationale of Chiazor, between blue water vessels and oil drilling vessels[36] surely results

35/(cont'd)
held "is a blanket denial to alien workers employed by American companies or on American ships of the same rights enjoyed by their fellow American workers with whom they work side by side and with whom they are subject to the same risks of their hazardous employment". Merchant Marine Hearings, p. 261.

36/The court of appeals in Chiazor stated that the tenets of Rhoditis and Lauritzen do not apply with the same force to a "submersible drilling rig" as they do to a "true maritime vessel, one plying the seas as an integral part of the shipping industry" (648 F.2d p. 1017).

in a punitive and unconstitutional discrimination against owners of blue water vessels. Moreover, there is absolutely nothing in Lauritzen or Rhoditis, or the Jones Act, which would suggest that this Court or the Congress meant to immunize certain "types" of vessels from the application of those two decisions or the Jones Act itself.[37] Indeed, how can the court of appeals in this case refute the long line of Supreme Court and circuit court decisions summarized by David Gray Carlson, in his

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[37] Prof. Jenkins queried:
"What of their 'blue water' counterparts also employing foreign nationals in their crews who will remain liable under the Jones Act . . . By what overriding governmental or judicial necessity should a small segment of the maritime industry be given such an advantage?" (Merchant Marine Subcommittee Hearings on H.R. 6705, supra at p. 262).

thorough legal treatise, The Jones Act and Choice of Law, Vol. 15, International Lawyer 48:

> "The easiest way to identify a ship as American is by its flag. The United States has very strict rules emphasizing American ownership and control, as to which vessels can register under the United States laws. Application of the Jones Act to any seaman aboard a vessel flying an American flag is beyond doubt. Some courts have said that a defendant owning a vessel registered in this country is estopped from claiming that United States law should not apply to its affairs . . . vessels completely owned by Americans are easy cases. Courts will infer control of the vessel from its complete ownership."

The foregoing principles are firmly established by Lauritzen, Rhoditis, the legendary decision in Bartholomew v. Universe Tankships, Inc., Antypas, and Moncada v. Lemuria Shipping Co., 491 F.2d 470 (2nd Cir. 1974) cert. den. sub. nom. 417 U.S. 947).

The Fifth and Ninth Circuits[38/] have engaged in judicial legislating.

Because of the far ranging effects of their holding and conflict with the decisions of the Second Circuit, which would seem to apply Lauritzen and Rhoditis with equal force to all vessels,[39] the exercise of this Court's power of review is proper and necessary.

VI.

THE INSISTENCE OF THE COURT OF APPEALS IN THIS CASE AND IN CHIAZOR AND PHILLIPS TO BALANCE THE LAURITZEN-RHODITIS CHOICE-OF-LAW FACTORS, INSTEAD OF APPLYING THE SUBSTANTIALITY TEST, PLACES THE FIFTH AND NINTH CIRCUITS SQUARELY IN CONFLICT WITH THE SECOND CIRCUIT COURT AND SO FAR DEPARTS FROM CLEAR SUPREME COURT LAW THAT THIS COURT SHOULD EXERCISE ITS POWER OF REVIEW.

This Court, in Rhoditis, expressly adopted the rule announced in Bartholomew:

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[38] See Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980) cert. den. 101 S.Ct. 1999 (1981).

[39] Bartholomew, Antypas and Moncada.

> "(T)he decisional process of arriving at a conclusion on the subject of the application of the Jones Act involves the ascertainment of the facts or groups of facts which constitute contacts between the transaction involved in the case and the United States, and then deciding whether or not they are substantial. Thus each factor is to be 'weighed' and 'evaluated' only to the end that, after each factor has been given consideration, a rational and satisfactory conclusion may be arrived at on the question of whether all the factors present add up to the necessary substantiality. Moreover, each factor, or contact, or group of facts must be tested in the light of the underlying objective, which is to effectuate the liberal purposes of the Jones Act." (263 F.2d at p. 441).[40]

The Supreme Court has not overruled Rhoditis and Bartholomew. Carlson, The Jones Act and Choice of Law, 15 International Lawyer, p. 49 et seq. describes the Bartholomew test as follows:

> ". . .as soon as a substantial contact is found, a Court should stop its deliberations and proceed to apply the Jones Act to the case

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[40] Adopted by this Court, 398 U.S. at pp. 308, 309, see footnote.

> before it . . . a judge using the Bartholomew test need only consider each fact or group of facts constituting an American contact with the transaction to determine whether that contact is substantial; if no single contact is substantial, the judge must then decide whether the aggregate of insubstantial contacts adds up to the necessary substantiality. No balancing at all occurs in the Bartholomew test." (15 International Lawyer at p. 42, emphasis ours).[41]

The Fifth and Ninth circuit courts have defiantly applied a "balancing" or "preponderance" or "comparative" test,[42] in

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[41] In Moncada v. Lemuria Shipping Corp., 491 F.2d 420 (2nd Cir. 1974):

> "The majority of contacts enumerated in Lauritzen seem to favor the defendants in this case. But as we have indicated above, our task is not to weigh or balance present against absent contacts, but merely to determine whether the contacts which are present are substantial. Thus the Court in Rhoditis found for the plaintiff although the majority of contacts favored the defendant." (491 F.2d at p. 472).

[42] The court of appeals, in Chiazor, expressly noted with approval the district court's finding that "(t)he majority of the eight

direct conflict with this Court and the Second Circuit.

Such a serious conflict between the circuit courts and departure from the established precedent of this Court calls for this Court's exercise of its power of review.

VII.

AN ANALYSIS OF THE LAURITZEN-RHODITIS FACTORS IN THIS CASE ESTABLISHES THAT, AS A MATTER OF LAW, THERE ARE SUBSTANTIAL CONTACTS WITH THE UNITED STATES AND THUS UNITED STATES LAW SHOULD HAVE BEEN APPLIED.

As argued above, most certainly there at least exists a genuine dispute about

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42/(cont'd)
factors (presented in Lauritzen and Rhoditis) operate in favor of declining jurisdiction over this case," (648 F.2d at 1017, 1018, emphasis ours); see Phillips, 632 F.2d at p. 88, discussing the "comparative test". In this case, the court of appeals expressly held that "(t)he greater weight of the above articulated factors favors the application of Nigerian law." (Emphasis ours, p. 2 of opinion).

the material issues incident to the choice-of-law determination. But we now go a step further. We submit that when the Lauritzen-Rhoditis factors, and the other factors deemed relevant by other accepted authorities, are considered in the light of the undisputed evidence, the conclusion becomes inescapable that the district court and court of appeals should have held, as a matter of law, that substantial contacts existed, thus: (a) nationality of owner: American (McDermott) (pursuant to holding of the court of appeals);[43] (b) flag of

[43] As stated above, ownership of the vessel by Americans had been deemed sufficient, in itself, to constitute a "substantial" contact with the United States for the Jones Act to apply. Bartholomew, Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307 (2nd Cir. 1976); Moncada v. Lemuria Shipping Corp., supra, In Bartholomew, Judge Medina termed "in doubt" the cases which hold that "ownership alone is not enough". See also Vol. 15, International Lawyer 49, Carlson, The Jones Act and Choice of Law, at pp. 60-63.

the vessel: American (found by court of appeals;[44/] (c) base of operations of

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[44/] As discussed under V, supra, the fact that a vessel is American flagged is sufficient in itself to mandate application of American law. See authorities cited in Carlson, The Jones Act and Choice of Law, 15 International Lawyer at pp. 60-63. In Lauritzen, Mr. Justice Jackson pertinently observed:

"Law of the Flag - Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag.

"This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. United States v. Flores, 289 U.S. 137, 155-159, 53 S.Ct. 580, 584-586, 77 L.Ed. 1086, and cases cited.

"It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As

owner and/or operator of vessel: U.S.,

since the owner (McDermott) is based in

44/(cont'd)
this Court held in United States v. Flores, supra, 289 U.S. at page 158, 53 S.Ct. at page 586, and iterated in Cunard S.S. Co. v. Mellon, supra, 262 U.S. at page 123, 43 S.Ct. at page 507:

> 'And so by comity it came to be generally understood among civilized nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the . . . tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require.***'

"This was but a repetition of settled American doctrine." (73 S.Ct. at pp. 929, 930).

U.S. and operator (Oceanic) is also based in the U.S.;[45] (d) law of forum: U.S. law favorable and adequate; (e) accessibility and availability of remedy in foreign forum: Nigerian law does not provide an adequate remedy;[46]

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[45] This court in Rhoditis stated: "(T)he shipowner's base of opeations is another factor of importance in determining whether the Jones Act is applicable; and there may well be others . . ." (398 U.S. at p. 309). The court of appeals held that the base of operations of Oceanic was "either Brussels, Belgium or Lagos, Nigeria" but the Respondents asserted only that Nigerian law should apply and according to Mr. Justice Jackson in Lauritzen the appellate courts should only consider as an alternative law that asserted by the defendants in the trial court (73 S.Ct. at p. 929, where Mr. Justice Jackson disregarded the factors pointing to Cuban law because "neither party urges Cuban law as controlling". As to Nigeria, it is beyond reason to say that Oceanic's base of operations was there when it had no office, officer, assets or agent for service there. Indeed, the corporation was run by its board of directors and officers, all of whom were situated in New Orleans. Clearly, New Orleans was the base of operations of Oceanic.

nor are the owning (McDermott) and operating (Oceanic) Respondents amenable

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46/ See App. 6, which establishes that the remedy in Nigeria ($4,000 U.S. for a relatively young widow and several children) is so clearly inadequate as to be tantamount to no remedy at all. In the very recent decision of this Court in Piper Aircraft v. Reyno, Mr. Justice Marshall, in discussing the comparison of the law of the chosen forum with the law of the suggested foreign forum, in a forum non conveniens determination, which is not unlike a comparison of the law of the foreign forum to the law of the chosen forum in a choice-of-law determination, stated:

> "Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the District Court may conclude that dismissal would not be in the interest of justice. . .
>
> "At the outset of any forum non conveniens inquiry, the Court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the Defendant is 'amenable to process' in the other jurisdiction." Gilbert, 330 U.S. at 506-507. (50 U.S.L.W. at p. 4060, emphasis ours).

to process in Nigeria;[47] and the Respondents failed to prove what the procedural and due process law of Nigeria was;[48] therefore, this factor favors

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[47] The district court in this case did not even condition its dismissal upon the Respondents submitting themselves to the jurisdiction of the Nigerian court, as was done in Chiazor, but in any event, this Court, in Hoffman v. Blaski, 363 U.S. 335 (1960), condemned the device of artifically inducing transfer to a court other than the one chosen by plaintiff simply by the defendants voluntarily submitting to the jurisdiction of the transferee court. See also Tivoli Realty, Inc. v. Interstate Circuit, Inc., 167 F.2d 155 (5th Cir. 1948) cert. den. 434 U.S. 837; and Silver v. Country Wide Realty, Inc., 39 F.R.D. 596 (D.C. N.Y. 1966), holding "the test is whether the Plaintiff could have brought the action in the foreign forum in the first instance."

[48] In Symonette Shipyards, Ltd. v. Clark, 365 F.2d 464 (5th Cir. 1966), the court held that where the party seeking to have foreign law applied fails to prove as a fact specifically what that law is, then the court of the chosen forum has no choice but to apply the law of the forum.

the application of U.S. law; (f) place of relevant contracts: as stated previously, the bareboat charter contract and the employment contract of the supervisory personnel provided for the application of U.S. law and were executed in the U.S.; this factor clearly goes to the U.S.;[49] (g) nationality of seaman: Mr. Johnson is a citizen of Nigeria; however, this element is entitled to little weight;[50] (h) place of accident:

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[49] In Antypas the court found that the fact that the contract between the owner and operator of the Marchessini Lines provided for delegation to an American sub-agent was a substantial contact. Also in Symonette the fact that "the contract between Symonette (Shipyards) and Wilson to transport tanks and equipment was made in this country" was considered significant (365 F.2d at p. 467).

[50] This Court stated in Rhoditis that: "The flag, the nationality of the seaman, the fact that his employment agreement was Greek, and that he might be compensated there are in the totality of the circumstances of this case, minor weights in the scales compared with the substantial and continuing contacts that this alien owner has with this country." (398 U.S. at p. 310, emphasis ours).

this accident happened in international waters off the coast of Nigeria, and even if this element is accorded to Nigeria, Mr. Justice Jackson stated in Lauritzen that it is also entitled to little weight;[51] (i) nationality of the officers of the owner and operator and of the supervisory personnel on the rig: it is undisputed that the relevant officers and supervisors, Graves, Cunningham, Richie, McCarte, Ashbaugh and Martin, were all Americans, paid by American or American based companies; this element goes to the U.S.;[52] (j) place of receipt

[51] It was there stated: "The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts . . ." (345 U.S. at p. 583).

[52] These connecting factors were deemed substantial in Bartholomew, Moncada and Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 308 (2nd Cir. 1976). In Moncada, the court noted as a substantial contact: "In addition to those contacts all officers of the defendants are American" (263 F.2d at p. 441).

of revenues from the vessel and place from where disbursements are made for expenses of the vessel: the evidence indicates that much of the income from the vessel ended up in the U.S., with much of the expenditures of the vessel emanating from the U.S.; this element goes to the United States;[53] and (k) other relevant contacts.[54]

Since these contacts with the Unite States are, in the aggregate, so overwhelmingly "substantial", the court of appeals' decision, if left to stand, would

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[53] This was considered a substantial contact in Antypas: "Moreover, the earnings from the vessel appear to be collected in New York and the expenses of the vessel paid from New York." (541 F.2d at p. 310).

[54] Other contacts deemed relevant: the McDermott companies advertised in the U.S., Antypas, 541 F.2d at p. 309, [illegible]0; accounting work was performed in the U.S., Antypas, 541 F.2d at p. 310; the fact that most of the vessel owner's banking was done in the U.S. is considered important, Ta Chi Navigation (Panama)

nullify Lauritzen, Rhoditis and Bartholomew, and other Second Circuit court decisions and so far departs from Supreme Court precedent as to demonstrate clearly the need for this Court's exercise of its power of review.

CONCLUSION AND PRAYER

While we are filing a motion, based upon achieving an economy of justice and saving the time of this Court, to consolidate this case with Chiazor v. Transworld Drilling Co., Ltd., et al (Application for Certiorari pending No. _____, in this Court), we do point out that even though these two cases involve generally the same issues

54/(cont'd)
Corp., S.A., 462 F.Supp. (D.C. N.Y. 1978); the fact that the Respondents in this case indisputedly engaged in "substantial business activities" of all kinds in the U.S. is considered important. Fisher v. Agios; Antypas; Moncada; Bartholomew; Ta Chi Navigation.

and general factual background, there are some vital distinctions which should be noted: (1) the vessel in Chiazor was a semi-submersible rig which had been drilling in Nigerian waters since 1964; the vessel in this case is a derrick barge which frequently moved from one ocean to another and had moved across the Atlantic Ocean from Brazilian waters just two years prior to the accident in question; (2) the vessel in Chiazor had no flag; the vessel in this case is clearly American flagged; (3) the vessel in Chiazor was owned by a Panamanian corporation; the vessel in this case was directly and clearly owned by an American corporation (McDermott). Certainly, we do not retreat from our position, taken in Chiazor, that the court should grant Petition for Certiorari in that case for the reasons there clearly stated, but we

do point out that what is true about what we say in Chiazor is doubly true here because of the even stronger, and more direct, ties between the United States and this vessel, and because of the difference in the nature and use of the vessel in this case.

This case points up the unworkability of the radical new rule announced in Chiazor (that somehow or other, Lauritzen and Rhoditis do not apply to oil drilling vessels) because how do potential parties to these lawsuits know, and how do any other courts know, where to draw the line - that is, which vessels fall within the Chiazor rule and which vessels do not? Does the rule include vessels which transport supplies or personnel to oil drilling vessels (such as crewboats and supply boats); does it include surveying vessels; does it include pipelaying vessels; does it include vessels used to

maintain, repair or construct offshore facilities; and does it include diving vessels? While all of these vessels are utilized in various direct and indirect ways to support offshore drilling, they are all classic vessels constructed, generally speaking, like blue water vessels; they move all over the world from one drilling area to another.[55] It is clear that the Chiazor rule will result in nothing but judicial confusion, and for that reason alone should be rejected.

We do not understand why many of the district and circuit courts strive so hard to disfranchise these foreign seamen, who perform the same ultrahazardous

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[55] Judge Fisher, in Castanho v. Jackson Marine, Inc., for example, held that the supply boat on which the Plaintiff there was injured did not fall within the perambit of the Chiazor rule. (Opinion, ____ day of _____, 1981, Cause No. _____, E.D. Tex. 1981).

work as their American fellow crewmen, from the remedial umbrella of the Jones Act. If it is the crowded court dockets that motivates them, then they should be reminded of this Court's fairly recent wise observations in Reiter v. Sonotone, 442 U.S. 330 (1979):

> "Respondents also argue that allowing class actions to be brought by retail consumers like the petitioner here will add a significant burden to the already crowded dockets of the federal court. That may well be true but cannot be a controlling consideration here. We must take the statute as we find it..."

And this is really all we ask: that this Court grant writ of certiorari in order to eliminate the present confusion in the district courts, reconcile the sharp conflicts between the circuit courts and redirect the energies of so many of our district and circuit courts along the lines that the Constitution prescribes, namely the traditional judicial task of enforcing the statutes (including the

Jones Act) as the courts find them and applying the venerable doctrine of stare decisis with consistency. What is Congress' responsibility should be left to Congress, and what has been decided by the Supreme Court should be left only to the Supreme Court to change.

BENTON MUSSLEWHITE
1003 Wirt Road #110
Houston TX 77055
(713)465-2308
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of March, 1982, three true and correct copies of the above and foregoing Petition for Certiorari were sent to Jack Allbritton, of Fulbright & Jaworski, Bank of the Southwest Bldg., Houston TX 77002, attorney for Respondents, by United States mail, postage prepaid.

BENTON MUSSLEWHITE

Appendix

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of the stock of McDermott (Nigeria) Limited is owned by Nigerian nationals residing in Nigeria. McDermott (Nigeria) Limited performs no services and sells no products within the United States, nor is it authorized to transact business in any state; the company has never appointed an agent for service of process in any state of the United States. McDermott (Nigeria) Limited maintains no office or place of business in the United States and has no employees, agents, bank accounts or any property of any kind or nature in the United States. McDermott (Nigeria) Limited pays 45% of all of its profits as taxes to the government of Nigeria and pays no taxes of any nature to the United States government.

5. The stock of McDermott Overseas, Inc. is owned 100% by defendant J. Ray McDermott & Co., Inc.

6. The Derrick Barge No. 24, the situs of the accident, is owned by J. Ray McDermott & Co., Inc. and flies the U. S. flag. At the time of the accident in question Derrick Barge No. 24 was under a bare-boat charter to Oceanic Contractors, Inc., a Panamanian corporation whose principal office and place of business is in Brussels, Belgium.

7. Oceanic Contractors, Inc. is a wholly-owned subsidiary of J. Ray McDermott & Co., Inc., but it only conducts business outside the United States.

8. Plaintiff has sought and obtained relief in Nigeria.

9. Defendant J. Ray McDermott & Co., Inc. maintains and sets forth evidence to show that it is a separate entity from McDermott (Nigeria) Limited,

McDermott Overseas, Inc., and Oceanic Contractors, Inc. Plaintiff has failed to rebut such proof.

In making the determination of whether forum non conveniens applies the Court can look to the following factors:

1. the choice of law;
2. the ease of access to proof;
3. the availability of compulsory process;
4. the cost of obtaining willing witnesses;
5. the possibility of a view of the premises.

Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

In determining whether American law should apply the Court must apply the due process guidelines set out in Lauritzen v. Larsen, 345 U.S. 571 (1953) and Helenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970). These guidelines are to help the Court determine whether substantial contacts exist with the United States so as to maintain jurisdiction and apply United States maritime law. The factors to be examined in making such determination include:

1. The place of the wrongful act.
2. The law of the ship's flag.
3. The allegiance or domicile of the injured seaman.
4. The allegiance of the shipowner.[1]
5. The inaccessibility of a foreign forum.
6. The place where the shipping articles were signed.

[1] Under a bareboat charter the charterer becomes the owner pro hac vice of the vessel and succeeds to all the liabilities of the vessel owner with regard to the seaworthiness of the vessel. Guzman v. Pichirilo, 369 U.S. 698 (1962); Massey v. Williams-McWilliams, Inc., 414 F.2d 675 (5th Cir. 1969) certiorari denied, 396 U.S. 1037, remand 317 F.Supp 37 (1970). Since we have a bareboat charter the allegiance of the actual shipowner is of small importance. More relevant here is the allegiance of the owner pro hac vice, which is Panama.

7. The law of the forum.

8. The base of operations of the shipowner.[2]

The place of the wrongful act is Nigeria; the allegiance of the injured seaman is Nigeria; the allegiance of the owner pro hac vice is Panama; there is an available foreign forum; the situs of the employment contract is Nigeria; the base of operations of the owner pro hac vice is either Brussels, Belgium or Lagos, Nigeria. These factors weigh in favor of the applicability of Nigerian law. Only the law of the ship's flag and the law of the forum, both of which are Unied States law, support application of United States maritime law. The greater weight of the above-articulated factors favors the application of Nigerian law.

The other factors pertinent to the forum non conveniens determination further point to the inappropriateness of this forum. The proof lies in Nigeria; compulsory process for those witnesses in Nigeria is unavailable; the cost of bringing the witnesses to Houston, Texas is prohibitive; and there is very little possibility of viewing the Derrick Barge No. 24 here. Therefore, it is ORDERED that defendant J. Ray McDermott & Co., Inc.'s motion to dismiss on grounds of forum non conveniens is granted and J. Ray McDermott & Co., is hereby DISMISSED as a defendant in this suit.

Signed this 22nd day of August, 1979.

Robert O'Conor, Jr.
ROBERT O'CONOR, JR.
United States District Judge

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[2]For the reasons set forth in footnote 1 the more relevant base-of-operations "shipowner" is the owner pro hac vice, or Oceanic Contractors, Inc., whose base of operations is Brussels, Belgium or Lagos, Nigeria.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 80-2378

Summary Calendar

UGBONE JOHNSON,
Plaintiff-Appellant,

v.

McDERMOTT OVERSEAS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

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(OCTOBER 16, 1981)

Before CHARLES CLARK, Chief Judge, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Ugbone Johnson appeals from the district court's order dismissing J. Ray McDermott & Co. on the grounds of *forum non conveniens* and dismissing McDermott (Nigeria) Limited, McDermott Overseas, Inc. and Oceanic

Contractors, Inc. for lack of personal jurisdiction. We affirm.

Johnson, a Nigerian citizen, was employed by McDermott (Nigeria) Limited (MNL), a Nigerian corporation, to work on a barge stationed off the coast of Nigeria. The barge was owned by J. Ray McDermott & Co. (McDermott), a Delaware corporation, and flew the American flag. The barge was, however, bareboat chartered to Oceanic Contractors, Inc. (Oceanic), a Panamanian corporation. Oceanic is a wholly owned subsidiary of McDermott. Sixty percent of the stock of MNL is held by McDermott Overseas, Inc. (MOI), a Panamanian corporation, which is in turn a wholly owned subsidiary of McDermott.

The case arose when the appellant broke his leg while working for MNL on McDermott's barge. Appellant initially brought suit against McDermott in the District Court of Texas under the Jones Act and the general maritime law. When McDermott moved to dismiss the case on the ground of *forum non conveniens*, the appellant amended his complaint to include MNL, MOI and Oceanic as defendants.

The district court granted McDermott's motion to dismiss the suit against it on the grounds of *forum non conveniens*. The court found that under the tests articulated in Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and Hellenic Lines v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), American law should not be applied to the appellant's claim. The court reasoned that:

> [t]he place of the wrongful act in Nigeria; the allegiance of the injured seaman in Nigeria; the al-

> legiance of the owner *pro hac vice* [Oceanic] is Panama; there is an available foreign forum; the situs of the employment contract is Nigeria; the base of operations of the owner *pro hac vice* is either Brussels, Belgium or Lagos, Nigeria . . . Only the law of the ship's flag and the law of the forum, both of which are United States law, support application of United States maritime law. The greater weight of the above articulated factors favors the application of Nigerian law.

The court further found that (1) the proof of the case was in Nigeria, (2) transporting the witnesses from Nigeria would be prohibitively expensive, and (3) compulsory process over Nigerian witnesses was unavailable. Based on these findings the suit against McDermott was dismissed.

The appellant contends that in considering the "base of operations," a factor used in determining the applicable law, the district court should have focused on McDermott, the owner of the barge, rather than Oceanic, the bareboat charterer. Appellant argues that if the court had considered McDermott's operations, it would have found that American law applied and would have retained jurisdiction. *See* Chiazor v. Transworld Drilling Co., 648 F.2d 1015, 1018 (5th Cir. 1981). We disagree.

In *Chiazor*, this court recently affirmed the trial judge's dismissal, for *forum non conveniens*, of a suit whose facts are almost identical to those in the present case. In *Chiazor*, as in this case, a Nigerian citizen had been employed by a Nigerian corporation, which was also a subsidiary of an American corporation. The plaintiff had signed a contract in Nigeria and had been injured while working on a vessel stationed off the Nigerian coast. The

court in *Chiazor* found that even if the base of operations were considered to be that of the American parent rather than that of the foreign subsidiary, American law should not be applied. Thus, even if we accepted appellant Johnson's argument that the true base of operations in this case was the United States, *Chiazor* still requires us to affirm the district court's dismissal of McDermott.[1]

The appelant also contends that the district court erred in dismising MNL, MOI and Oceanic for lack of personal jurisdiction. We need not reach this contention. When MNL, MOI and Oceanic initially moved to dismiss the complaint against them, they contended that the court lacked personal jurisdiction and, alternatively, that the complaint should be dismissed for *forum non conveniens.* The district court did not reach the issue of *forum non conveniens* because it found that it lacked sufficient contacts to assert jurisdiction over the defendants. Because the position of MNL, MOI and Oceanic is the same as that of McDermott, we affirm the trial court's dismissal on the ground of *forum non conveniens.* The District Court in Texas is an improper forum for the foreign subsidiaries, MNL, MOI and Oceanic just at it is for McDermott, their American parent.

AFFIRMED.

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1. Castanho v. Jackson Marine, Inc., 650 F.2d 546 (5th Cir. 1981) (per curiam) does not require a different conclusion. In *Castanho,* when the trial court denied the defendant's motion to dismiss for *forum non conveniens,* the defendant sought review of the trial court's decision by a writ of mandamus. Thus, the issue before this court in *Castanho* was not simply whether the trial court had abused its discretion but whether there was such an abuse of discretion that mandamus should issue. Not only was the issue in *Castanho* different from that in *Chiazor,* but each case also reflects the latitude which this court has accorded the discretion of the trial judge in deciding whether to grant or deny such a motion.

APPENDIX 3

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 80-2378

UGBONE JOHNSON,

Plaintiff-Appellant

versus

McDERMOTT OVERSEAS, INC., ET AL,

Defendants-Appellees

Appeal from the
United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 16, 1981, 5 Cir., 1981)

(DECEMBER 4, 1981)

Before CHARLES CLARK, RUBIN, and
SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Rderal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CHARLES CLARK
United States Circuit Judge

percent of which is owned by MOI and forty percent of which is owned by Nigerian nationals; and Oceanic Contractors, Inc. (OCI), a Panamanian corporation wholly owned by JRMc.

At the time of the incident made the basis of this lawsuit, Plaintiff alleges that he was a seaman aboard the vessel, "Derrick Barge 24", in the waters off the coast of Nigeria. While working on the barge, on or about August 19, 1976, Plaintiff claims that he was injured when he became entangled in ropes and was pulled into the air above the deck. The "Derrick Barge 24" is owned by JRMc and flies the U.S. flag; however, at the time of the accident in question, it was under a bareboat charter to OCI. Plaintiff subsequently received Worker's Compensation benefits under the laws of Nigeria; however, he brings his action to recover for injuries received for the alleged negligence of the Defendants under the Jones Act, 46 U.S.C. § 688, and under general maritime law.

* * *

Plaintiff advances an alter ego argument, claiming that proper *in personam* jurisdiction over the parent corporation, JRMc, may be imputed into its subsidiaries. *See Reul v. Sahara Hotel,* 372 F. Supp. 995 (S.D. Tex. 1974). This Court will not quickly disregard separate corporate entities at the mere incantation of the term "alter ego". Plaintiff must show that the parent corporation so totally dominates the subsidiary, that the subsidiary manifiests no separate corporate interests of its own and functions solely to achieve the purposes of the parent corporation. *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.,* 483 F.2d 1098, 1106 (5th

Cir. 1973). Complete ownership by the parent of its subsidiary does not warrant disregarding the corporate separateness of the entities, *Dematteos v. Texaco,* 562 F.2d 895, 902 (3rd Cir.) *cert. denied,* 435 U.S. 904 (1977); moreover, the utilization of a common name, identity of officers or joint advertising literature by separate corporations does not necessarily unite the two corporations for all purposes. *See e.g., Overstreet v. Southern Railway Co.,* 371 F.2d 411, 412 (5th Cir.), *cert. denied,* 387 U.S. 912 (1967); *Turner v. Jack Tar Grand Bahama Ltd.,* 353 F.2d 954, 956 (5th Cir. 1965).

In the present case, as exhibited by sworn affidavits and jurisdictional discovery on file, it is apparent that while MOI, MNL, and OCI were all subsidiaries of JRMc, they maintained separate corporate existence and purpose. *See* Davis Depo. pp. 70-119. Furthermore, this Court finds a dearth of control over the day-to-day operations of the subsidiaries by the parent corporation, JRMc, and this lack of control tends to negate any inference of alter ego. *See Coles v. Humble Oil and Refining Company,* 348 F. Supp. 1240, 1243 (S.D. Tex. 1972); Davis Depo. pp. 195-96. Thus, this Court concludes that JRMc is a true multi-national corporation with foreign subsidiary corporations and that JRMc's control over its subsidiaries, while substantial, is insufficient to impute *in personam* jurisdiction over the subsidiaries.

* * *

By order of this Court dated August 22, 1979, Plaintiff's cause of action against JRMc was dismissed under the doctrine of *forum non conveniens.* This order was subsequently set aside to allow further jurisdictional dis-

covery. The additional discovery that has been made has not persuaded this Court that its earlier Memorandum and order was incorrect, and it is hereby reinstated and incorporated into this Memorandum and Order. Therefore, that part of Plaintiff's cause of action against J. Ray McDermott & Company, Inc., is dismissed under the doctrine of *forum non conveniens.*

It is therefore ORDERED, ADJUDGED and DECREED that Defendants McDermott Overseas, Inc., McDermott (Nigeria) Ltd., and Oceanic Contractors, Inc.'s Motion to Dismiss is hereby GRANTED and Plaintiff's Complaint as it pertains to them is DISMISSED for lack of *in personam* jurisdiction.

It is further ORDERED that this Court's Memorandum and Order dated August 22, 1979 is hereby reinstated and Defendant J. Ray McDermott & Company, Inc.'s Motion to Dismiss is GRANTED and that part of Plaintiff's Complaint against J. Ray McDermott & Company, Inc. is DISMISSED under the doctrine of *forum non conveniens.*

Signed this 13th day of November, 1980.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX 4A

46 U.S.C. § 688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250 § 33, 41 Stat. 1007.

APPENDIX 4-B

Rule 12.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

* * *

APPENDIX 4-C

Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

APPENDIX 4-D

Amendment VII—Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

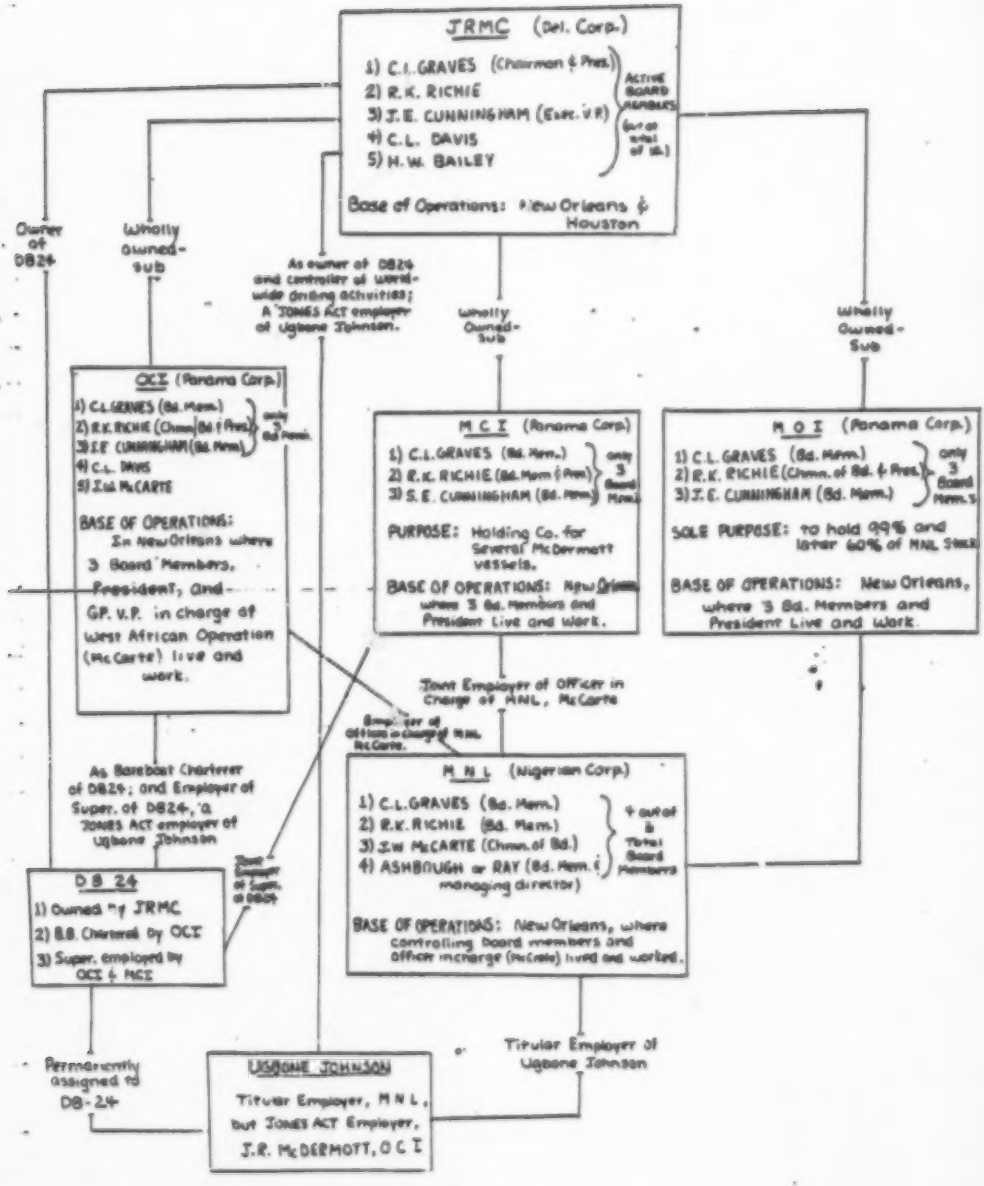
* * *

APPENDIX 4-E

Amendment XIV—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX 5


JRMC (Del. Corp.)
1) C.L. GRAVES (Chairman & Pres.)
2) R.K. RICHIE
3) J.E. CUNNINGHAM (Exec. V.P.)
4) C.L. DAVIS
5) H.W. BAILEY
ACTIVE BOARD MEMBERS (but at least 1/2 of Bd.)
Base of Operations: New Orleans & Houston
Owner of DB24
Wholly owned-sub
As owner of DB24 and controller of world-wide drilling activities; A JONES ACT employer of Ugbone Johnson.
Wholly Owned-Sub
Wholly Owned-Sub
OCI (Panama Corp.)
1) C.L. GRAVES (Bd. Mem.)
2) R.K. RICHIE (Chmn. Bd. & Pres.)
3) J.E. CUNNINGHAM (Bd. Mem.)
4) C.L. DAVIS
5) J.W. McCARTE
only 3 Bd. Mem.
BASE OF OPERATIONS: In New Orleans where 3 Board Members, President, and G.P. V.P. in charge of West African Operation (McCarte) live and work.
MCI (Panama Corp.)
1) C.L. GRAVES (Bd. Mem.)
2) R.K. RICHIE (Bd. Mem & Pres.)
3) S.E. CUNNINGHAM (Bd. Mem.)
only 3 Board Mem.s
PURPOSE: Holding Co. for Several McDermott vessels.
BASE OF OPERATIONS: New Orleans where 3 Bd. Members and President Live and Work.
MOI (Panama Corp.)
1) C.L. GRAVES (Bd. Mem.)
2) R.K. RICHIE (Chmn. of Bd. & Pres.)
3) J.E. CUNNINGHAM (Bd. Mem.)
only 3 Board Mem.s
SOLE PURPOSE: to hold 99% and later 60% of MNL Stock
BASE OF OPERATIONS: New Orleans, where 3 Bd. Members and President Live and Work.
Joint Employer of Officer in Charge of MNL, McCarte
Employer of Officers in charge of MNL McCarte.
As Bareboat Charterer of DB24; and Employer of Super. of DB24, a JONES ACT employer of Ugbone Johnson
MNL (Nigerian Corp.)
1) C.L. GRAVES (Bd. Mem.)
2) R.K. RICHIE (Bd. Mem.)
3) J.W. McCARTE (Chmn. of Bd.)
4) ASHBOUGH or RAY (Bd. Mem. & managing director)
4 out of 5 Total Board Members
BASE OF OPERATIONS: New Orleans, where controlling Board members and officer in charge (McCarte) lived and worked.
Joint Employer of Super. of DB24
DB 24
1) Owned by JRMC
2) B.B. Chartered by OCI
3) Super. employed by OCI & MCI
Permanently assigned to DB-24
UGBONE JOHNSON
Titular Employer, MNL, but JONES ACT Employer, J.R. McDERMOTT, OCI
Titular Employer of Ugbone Johnson

APPENDIX 6

[1]

AFFIDAVIT RE NIGERIAN MARITIME INJURY LAW

Robert L. Leggett being first duly sworn deposes and says that he is a Member of the District of Columbia and California Bars for the past 30 years. That he is experienced as a trial lawyer in State and Federal Courts in negligence and workmen's compensation cases. That he has served for 16 years as a Member of the United States Congress on the Merchant Marine Committee of the House of Representatives and that for the past two years has served as President of the Joint Maritime Congress, an amalgamate of all U. S. Flag Shipping Companies and the Marine Engineer's Union, and that he is familiar with Jones Act cases under 46 USC 688, that he is knowledgeable with respect to Nigerian Law, both by conducting international transactions with said country and by frequently reviewing the laws and decisions of said country as contained in the United States Library of Congress in Washington, D. C. and by discussing the same with visiting legal scholars.

. . . In general where the courts have jurisdiction, the rules of stare decises are not spelled out adequately so all decisions are nearly de novo. There are no legal encyclopedias or digests, but annual collections of rare random decisions. Most decisions that allow damages for inquiry would not be adequate by Western standards.

By custom the people of Nigeria do not have a well established Negligence law because persons surviving

those struck down by negligence consider most recoveries to be "blood money" and are frowned upon.

[2]

When Nigeria became independent of Britain in 1959, all British statutes terminated. The theme of some statutes have been reenacted. During the 70's, Civil War tore the country of Nigeria apart including its legal system. This is the current basic reason for the fortuitous status of that country's laws.

Wrongful death actions in Nigeria are based on the "Fatal Accidents Acts" of the various states. All require a showing of negligence, no contributory negligence and proximate cause. Most States have a 3 year statute of limitation and lost earnings are usually regarded maximum 8 to 12 years au futoro. . . .

Where action is brought by an injured servant against his master, . . .

A workman who takes dangerous risks generally assumes the risk normal in the employment except when there is a statute covering the employment.

[3]

Nigeria does not have anything comparable to our *Jones Act* type recoveries for a seaman. Injuries in territorial waters would be covered by regular Master and Servant Law and Workmens Compensation ORD 1957.

* * *

In any Negligence action by an employee, the burden of proof is on the employee to show negligence, and

As a result nobody can rely on any right to get permanent compensation under the law and the maximum recovery for permanent injury or death is set at 3200 Niaras.

* * *

A typical Nigerian resolution is attached. As is indicated John Erhurare, a Nigerian seaman under U. S. definition suffered amputation of one leg in an industrial oil drilling accident. The settlement shows that this claim was worth 2200 Niara in Nigeria and that settlement effectively precludes any other recovery in that country against Transworld Drilling (NIG) Ltd.

The same would be true for a similar settlement in a death case.

The tenor of Nigerian law is complete uncertainty, uncertainty of administration, procedure and damages are generally considered de minimis.

/s/ ROBERT L. LEGGETT
Robert L. Leggett

/s/ CATHERINE M. JOHN
Subscribed and Sworn to Before Me
This 7th Day of January, 1982
District of Columbia

My Commission Expires October 31, 1982

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-77-1706

JOHN IKESUME

vs.

J. RAY McDERMOTT & COMPANY,
INCORPORATED, et al.

MEMORANDUM AND OPINION

Pending before the Court are Defendant's Motion to Dismiss, Plaintiff's Motion for Leave to File an Amended Complaint, and Plaintiff's Motion to Compel Answers and Produce Documents.

Plaintiff, a Nigerian citizen, claims injury resulting from an accident which occurred on a barge off the Nigerian Coast. He invokes Jones Act (46 U.S.C. § 688) and general maritime jurisdiction over Defendant J. Ray McDermott and Co., Inc., a Delaware corporation with offices in New Orleans and in Houston.

The defendant, having admitted ownership of the barge in its original answer, later filed an amended answer which denied ownership in itself and attributed ownership to Marine Contractors, Inc., a Panamanian corporation wholly owned by defendant. On the basis of this amended answer, defendant filed a motion to dismiss for lack of Jones Act jurisdiction or in the alternative dismissal *forum non conveniens*. Plaintiff opposes the mo-

tion to dismiss, and contends that in light of defendant's amended answer it should be granted leave to file an amended complaint naming as defendants Marine Contractors, Inc., as well as several other subsidiaries of J. Ray McDermott and Co., Inc.

The initial inquiry here is whether we have Jones Act jurisdiction. If the Jones Act applies, the Court will not dismiss under the doctrine of *forum non conveniens. Antypas v. Cia. Maritima San Basilio, S.A.*, 541 F.2d 307 (2d Cir. 1976), *cert. denied,* 429 U.S. 1098 (1977); *Barthalomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert denied,* 359 U.S. 1000 (1959). See also *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947). If the Jones Act does not apply, then the Court can consider whether the traditional *forum non conveniens* factors warrant dismissal of the general maritime claim.

Although the Jones Act contains no express jurisdictional limitations, its application is appropriate only if there are substantial contacts linking the plaintiff to this forum. In *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 306 (1970), and *Lauritzen v. Larsen,* 345 U.S. 571 (1953), the Supreme Court identified the factors to be considered in determining whether the requisite substantial contacts exist. These factors are: 1) the place of the wrongful act, 2) the law of the ship's flag, 3) the domicile of the injured seaman, 4) the allegiance of the ship owner, 5) where the shipping articles were signed, 6) inaccessibility of the foreign forum, 7) the law of the forum, and 8) the base of operations of the ship owners. No one factor is dispositive, nor does the absence of several compel a conclusion that the Jones Act does not apply. *Barthalomew v. Universe Tankship, Inc.*, 263 F.2d 437 (2d Cir), *cert. denied,* 359 U.S. 1000 (1959).

APPENDIX 8

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NO. S-78-19-CA

EDWARD OKE

v.

J. RAY McDERMOTT & CO., INC., ET AL

O R D E R

Plaintiff filed his original complaint in the above-captioned admiralty suit on January 30, 1978, asserting claims under both the Jones Act, 46 U.S.C. § 688, and general maritime law. Since the inception of this action, four amended complaints have been filed. Plaintiff's most recent pleading, filed on October 16, 1980, names five corporations as co-defendants. Those defendants have moved to dismiss the suit on various grounds, including lack of personal jurisdiction, lack of subject matter jurisdiction, insufficiency of service, improper venue, *forum non conveniens,* and failure to state a claim on which relief may be granted. . . .

* * *

I. FACTUAL BACKGROUND

A summary of the factual allegations which underlie this suit is necessary to put defendants' contentions into perspective. According to affidavits and other documentary evidence submitted to date, the incident which precipitated plaintiff's claim occurred on February 3, 1973.

Here a Nigerian plaintiff was employed and injured in Nigeria. The barge was flying a Panamanian flag and is owned, according to defendant's answer, by a Panamanian corporation (Marine Contractors, Inc.). There is justification for looking beyond a foreign flag and foreign incorporation, however, for a "cold objective look at the actual operational contacts. . . ." *Hellenic Lines Ltd. v. Rhoditis,* 398 U.S. 308, 90 S.Ct. 1731 (1970). Such a look may reveal that the base of operations, despite an elaborate structure of holding companies and operational subsidiaries, rests primarily in the U.S. parent, thus providing substantial contacts for purposes of the Jones Act.

The Court finds such contacts here. The McDermott group is comprised of several corporations which offer services related to the offshore recovery of oil. There is evidence of extensive interlocking directorates, and at least some of the American-based directors of foreign subsidiaries divide their time between U.S. offices and foreign work sites. These working directors provide direct operational contacts which are not attenuated merely because the foreign subsidiaries maintain their principal corporate offices in other countries. Of added significance is the centralized accounting services provided by the parent, the consolidated financial statement, and the corporate debt structure; all point to the substantial contacts necessary for Jones Act jurisdiction.

The Court emphasizes that it is not making a finding of corporate contacts for purposes of liability. Specifically we are not determining whether the subsidiaries are the "alter ego" of the parent; resolution of this question must properly await the further development of facts. For purposes of Jones Act jurisdiction, however, the Court concludes that the parent corporation exercised substantial

operational control over the subsidiaries. *Ramirez v. Zapata Offshore Co.*, 73-H-1239 (S.D. Tx., August 2, 1974).

Defendant urges that the Court focus its attention on the contacts between the parent and McDermott Nigeria Ltd., owned 60% by another McDermott subsidiary and 40% by two Nigerian nationals. Defendant asserts that McDermott Nigeria Ltd. was the actual operator of the barge, and hence the owner for Jones Act purposes, under the terms of a bareboat charter with Marine Contractors, Inc., the owner named in Defendants' amended answer, further, Defendant asserts that there are insufficient contacts with this particular subsidiary to find Jones Act jurisdiction. We have no such charter before us, but conclude that its existence is unimportant to the jurisdictional question resolved here. The contacts of the U.S. parent with this Nigerian subsidiary are substantial for Jones Act jurisdiction.

Because we find substantial contacts for purposes of the Jones Act, we must deny Defendant's motion to dismiss. . . .

* * *

It is hereby ORDERED that Defendant's Motion to Dismiss is DENIED, Plaintiff's Motion for Leave to File its Second Amended Complaint is GRANTED, and Plaintiff's Motion to Compel Production of Documents is GRANTED.

SIGNED and ENTERED this 22nd day of July 1980.

/s/ GEORGE E. CIRE
George E. Cire
United States District Judge

. . . All five of the corporations listed above were named as defendants in accordance with plaintiff's theory that all of them had acted in concert as a single entity under the direction, supervision, and control of the parent company, J. Ray McDermott & Co., Inc. . . .

* * *

II. COMPLEXITY OF JURISDICTIONAL ISSUES.

The various grounds for dismissal asserted by defendants center around the interrelationship between the parent company, J. Ray McDermott & Co., Inc., and its foreign subsidiaries, McDermott (Nigeria), Ltd., McDermott Overseas, Inc., Marine Contractors, Inc., and Oceanic Contractors, Inc. Plaintiff maintains that these subsidiaries existed as separate, corporate entities in name only, and were all, in actuality, part of a single, multinational enterprise conducted by the parent corporation out of its main office in New Orleans, Louisiana. In support of that contention, plaintiff has described the interlocking directorates which characterized these subsidiary firms, as well as their extensive reliance upon the parent as a source of financing, markets, and technical assistance.

Defendants respond by emphasizing the structural atonomy of the foreign subsidiaries, as well as their independence from the parent firm in operating on a day-to-day basis. Defendants assert that the vessel on which

---

remedies under that statute or suing his employer for negligence in a civil court. An agreement between employee and employer for the payment of workman's compensation benefits operates to bar a subsequent suit against the employer for damages with respect to the same work-related injuries.

On that date, Edward Oke was employed aboard "Derrick Barge No. 15", a vessel used in offshore construction when he suffered a serious and disabling injury. At the time of this incident, the vessel was located in navigable waters off the coast of Nigeria.

Mr. Oke's employer was McDermott (Nigeria), Ltd., a Nigerian corporation owned in virtual entirety by McDermott Overseas, Inc., a Panamanian corporation which, in turn, was a wholly-owned subsidiary of J. Ray McDermott & Co., Inc., a multinational corporation chartered in Delaware with its principal place of business in New Orleans, Louisiana. The vessel on which plaintiff's injury occurred was owned by Marine Contractors, Inc., another wholly-owned subsidiary of J. Ray McDermott & Co., Inc., incorporated in Panama. The activities of both McDermott (Nigeria), Ltd., plaintiff's employer, and Marine contractors, Inc., the owner of Derrick Barge No. 15, were overseen by Oceanic Contractors, Inc., a wholly-owned subsidiary of J. Ray McDermott & Co., Inc., incorporated in Panama, which coordinated all of McDermott's foreign subsidiaries from its office in Brussels, Belgium.

* * *

. . . Mr. Oke accepted the workmen's compensation payment tendered by his former employer and signed a receipt, along with a release discharging McDermott (Nigeria), Ltd. "and any other person or company associated therewith from all further claims arising from his employment."*

* * *

* Under § 27 of the Workman's Compensation Law of Nigeria, an injured worker must make an election between pursuing his

plaintiff was injured bore absolutely no connection to the United States since it was registered in Panama, owned by a foreign company with its principal place of business in Belgium, and operated off the coast of Nigeria out of the local offices of a Nigerian corporation. Plaintiff's employer, according to defendants, was a marine contractor in its own right, possessing no relationship with the United States other than the majority ownership of its stock by J. Ray McDermott & Co., Inc.

These contrasting accounts of how this immense multinational concern related to an array of subsidiary corporations scattered throughout the world pose formidable obstacles to the disposition of defendants' motions to dismiss this action on jurisdictional grounds. Key factual issues remain in hot dispute, with little but self-serving affidavits and undocumented allegations to aid in resolving them. Defendants remain enmeshed in a baffling corporate labyrinth which impedes an accurate perception of the actual lines of authority and process of decision-making.

These thorny problems will be faced, if necessary, to dispose of all pending motions in this case. Yet it is in the interests of judicial economy and efficiency to postpone the resolution of such intricate issues, particularly in the absence of a well-delevoped record, where less tangled issues, which may themselves prove conclusive, have also been raised.

* * *

ORDERED that consideration of all of defendants' motions to dismiss this action on various jurisdictional grounds shall be deferred, without prejudice, pending the disposition of defendants' motions for summary judgment on the related grounds of limitations and laches.

SIGNED and ENTERED this 1st day of April, 1981.

/s/ WM. WAYNE JUSTICE
Wm. Wayne Justice
Chief Judge

APPENDIX 9

97TH CONGRESS
1ST SESSION

H. R. 4863

To modify the maritime laws applicable to the recovery of damages by certain foreign seamen.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 29, 1981

Mr. BIAGGI (for himself, Mr. BREAUX, Mr. FORSYTHE, Mr. BOWEN, Mr. SHUMWAY, Mr. HUTTO, Mr. FIELDS, Mr. TAUKIN, and Mr. HUBBARD) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

---

A BILL

To modify the maritime laws applicable to the recovery of damages by certain foreign seamen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 20 of the Act of March 4, 1915 (38 Stat. 1185), as amended (46 U.S.C. 688), is amended—

(a) by redesignating that section as section 20(a); and

(b) by adding at the end thereof the following new subsection:

"(b)(1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of the incident giving rise to the action, if the incident occurred—

"(A) while that person was engaged in the exploration, development, or production of offshore mineral or energy resources—including drilling, transporting supplies or personnel, mapping, surveying, diving, pipelaying, maintaining, repairing, or constructing, but not including transporting those resources by vessel; and

"(B) in the territorial waters or waters overlying the continental shelf of a nation other than the United States, its territories, or possessions. As used in this paragraph, the term 'continental shelf' has the meaning stated in article I of the 1958 Convention on the Continental Shelf.

"(2) Notwithstanding paragraph (1) of this subsection, an action may be maintained if the person bringing the action establishes that, at the time of the commencement of the action in the United States, no remedy was available to that person under the laws of the country—

"(A) asserting jurisdiction over the area in which the incident occurred; or

"(B) in which, at the time of the incident, the person for whose injury or death a remedy is sought maintained citizenship or residency.".

O

Opposition

Office - Supreme Court, U.S.
FILED
MAY 3 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UGBONE JOHNSON,
Petitioner

v.

J. RAY McDERMOTT & COMPANY, INC., ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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NO. 81-1701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UGBONE JOHNSON,
Petitioner

v.

J. RAY McDERMOTT & COMPANY, INC., ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice And The Associate Justices Of The Supreme Court:

Respondents respectfully submit this their Brief in Opposition to Petition for Writ of Certiorari and respectfully pray that the Court deny issuance of the writ.

STATEMENT OF THE CASE

This is a personal injury action brought by petitioner, a Nigerian employee of a Nigerian corporation, arising from an accident which occurred on August 13, 1976 while he was serving as a member of the crew of the

Derrick Barge 24, a vessel that was then engaged in marine construction in the offshore oil fields off the coast of Nigeria. Petitioner entered into his contract of employment in Nigeria with McDermott (Nigeria) Ltd., a Nigerian corporation headquartered in Lagos, Nigeria. The Derrick Barge 24 was owned by J. Ray McDermott & Co., Inc., and flew the United States flag, but had been bareboat chartered to Oceanic Contractors, Inc., a wholly-owned Panamanian subsidiary of J. Ray McDermott & Co., whose principal place of business was in Brussels, Belgium. During the time pertinent to this lawsuit, the Derrick Barge 24 was being utilized in the marine construction industry off the coast of Nigeria, with all day-to-day operations concerning the activities of the barge and its crew being directed and controlled out of the offices of McDermott (Nigeria) Ltd. Petitioner originally brought suit against J. Ray McDermott & Co., Inc. (the owner of the barge), and subsequently added as defendants McDermott (Nigeria), Ltd. (his employer), Oceanic Contractors, Inc. (bareboat charterer of the barge), and McDermott Overseas, Inc. (60 percent stockholder of McDermott (Nigeria), Ltd.). The additional defendants were subsidiaries or affiliates of the American parent company and the original defendant, J. Ray McDermott & Co., Inc.

Following the petitioner's injury, all of his medical treatment was provided in Nigeria by Nigerian doctors, and plaintiff was paid workman's compensation benefits by his Nigerian employer pursuant to the workman's compensation laws of Nigeria. At least three co-employees and members of the crew of the barge, also Nigerians, apparently have knowledge of the incidents surrounding the accident and would be witnesses in the case.

The District Court by its Memorandum and Order of August 22, 1979 (Appendix A) granted the Motion to Dismiss of J. Ray McDermott & Co., Inc., concluding that Nigerian law was applicable rather than that of the United States, and that the cause should be dismissed on grounds of *forum non conveniens*. Such Order however was set aside by Order of the District Court September 12, 1979, granting plaintiff's Motion for Rehearing, to allow additional discovery to take place. Thereafter, the remaining defendants moved to dismiss on similar grounds, as well as lack of personal jurisdiction and insufficient process.

By Memorandum and Order of November 12, 1980 (Appendix B), the District Court reinstated its previous order of August 22, 1979 dismissing the cause against defendant J. Ray McDermott & Co., Inc. on grounds of *forum non conveniens*, and granted the motions of the remaining defendants to dismiss for lack of *in personam* jurisdiction, with a Final Judgment being entered by the District Court on November 13, 1980 dismissing the entire case.

The Fifth Circuit affirmed the dismissal of the District Court as to all defendants on grounds of *forum non conveniens*, concluding under the authority of *Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3765 (March 22, 1982), that the District Court correctly held that Nigerian law was applicable and that dismissal was appropriate on grounds of *forum non conveniens*.[1]

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1. Appendix C. The Fifth Circuit thus found it unnecessary to consider the District Court's determination that it lacked personal jurisdiction over McDermott (Nigeria), McDermott Overseas, and Oceanic.

SUMMARY OF ARGUMENT

Petitioner has offered no valid reasons why a writ of certiorari should be allowed in this case, especially considering that the identical reasons advanced by petitioner for allowance of a writ were recently rejected by this Court, when it denied certiorari in the companion case of *Chiazor v. Transworld Drilling Company, Ltd.*, 648 F.2d 1015 (5th Cir. 1981), *cert. denied*, 50 U.S.L.W. 3765 (No. 81-1347, March 22, 1982). There is no conflict among the courts of appeal, and the Fifth Circuit correctly applied the legal standards applicable to the choice-of-law and *forum non conveniens* questions here presented.

REASONS FOR REFUSAL OF WRIT

On March 22, 1982, this Court denied certiorari in a nearly identical case, *Chiazor v. Transworld Drilling Company, Ltd., supra.* Counsel for petitioner in this case was also counsel for petitioner in *Chiazor.* Each of the seven reasons advanced by petitioner in this case for allowance of the writ were advanced in identical fashion by petitioner in *Chiazor,* a case which petitioner acknowledges involved "generally the same issues and general factual background" as this one.[2] Indeed, the whole thrust of petitioner's petition is an acknowledgment that *Chiazor* controls the disposition of this case, and in fact, prior to this Court denying certiorari in *Chiazor,* petitioner was contemplating filing a motion to consolidate his petition for certiorari in *Chiazor* with that in this case.[3]

---

2. Page 59-60 of Petition for Writ of Certiorari.

3. See page 59 of Petition for Writ of Certiorari.

No valid reason has been advanced by petitioner as to why this Court, having earlier denied certiorari in the analogous case from the Ninth Circuit, *Phillips v. Amoco Trinidad Oil Co.*,[4] and most recently in *Chiazor*, should now grant certiorari in this case.

Essentially petitioner seeks allowance of a writ by attempting to argue a conflict among the courts of appeal, an alleged denial of jury trial in the choice-of-law analysis, and finally raising the specter of discrimination. None of such reasons advanced by the petitioner has any merit.

The court below relied upon the Fifth Circuit's earlier decision in *Chiazor* on the choice-of-law analysis. *Chiazor* did not create a conflict with other circuits, either procedurally or substantively, as petitioner would have us believe. Petitioner argues that the Fifth Circuit is in conflict with the Third Circuit's decision in *Chirinos de Alvarez v. Creole Petroleum Corp.*, 613 F.2d 1240 (3rd Cir. 1980) from a procedural standpoint. Petitioner argues that the Fifth Circuit in *Chiazor* and in this case basically failed to treat the motion to dismiss and the choice-of-law analysis in accordance with Rules 12(b)(6) and Rule 56, F.R.C.P., and simply decided the choice-of-law issues as a matter of discretion despite disputed factual issues. Petitioner has totally misunderstood *Chiazor* and the court below. The Fifth Circuit is not in conflict with the Third Circuit's opinion in *Chirinos de Alvarez*. In both *Chiazor* and this case, the courts below determined from the undisputed material facts that Nigerian law should apply rather than United States law,

4. 632 F.2d 82 (9th Cir. 1980), *cert. denied, sub nom. Romilly v. Amoco Trinidad Oil Co.*, 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981).

and there is no indication from either opinion that the courts below applied a rule of discretion to the choice-of-law analysis.[5] Petitioner is simply not content with the determination of facts from the evidence presented. Petitioner, while referring to mounds of evidence, obviously confuses genuine issues of material fact with disputed bits of trivia.

In particular, petitioner zealously argues at length matters of evidence pertaining to his position that the respondents' base of operations is in the United States, and that the various respondents' corporate existence should in fact be pierced so that the foreign subsidiary respondents should be viewed merely as alter egos of the American parent corporation. Such arguments derive their source from the alleged fact issues which petitioner argues should not have been decided summarily. As such, they are irrelevant, as both the Fifth Circuit in *Chiazor* and in this case *assumed* a U. S. base of operations, and held that even in such event American law should not be applied. Thus, any objection by petitioner based upon the alleged procedural conflict between the Third Circuit in *Chirinos de Alvarez* and the Fifth Circuit below evaporates.

The indisputable facts as found by the District Court and Court of Appeals, and relied upon as supporting the conclusion that Nigerian rather than United States law should apply, included:

1. Petitioner is a Nigerian resident citizen.
2. He was employed in Nigeria by a Nigerian corporation.

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5. It was only after the District Court decided the choice-of-law question against petitioner that it had the discretion to dismiss the case on grounds of *forum non conveniens*.

3. He was injured in an accident while working on a construction barge stationed off the Nigerian coast.

4. The day-to-day operations of the barge were directed from Nigeria by personnel in Nigeria.

These are facts which cannot be denied and required no jury to determine. These factors in the context of this case took on added significance and clearly outweighed even an assumed U. S. base of operations based upon the parent-subsidiary relationships alleged.

Nor is there a conflict substantively between the Fifth and Ninth Circuits and Second Circuit on the applicable test in a choice-of-law analysis. Petitioner argues that the Fifth Circuit[6] and Ninth Circuit[7] have departed from the "substantiality test" of the Second Circuit,[8] presumed adopted by this Court in *Rhoditis*,[9] in favor of a "balancing test." Petitioner, however, miscontrues "balancing" with "weighing" and "evaluating" each choice-of-law contact. *Lauritzen*[10] clearly contemplated that a court should "weigh" and "evaluate" each factor, and that certain factors may be held to have more weight or significance than others. Indeed, some of the factors held to be of significant weight in *Lauritzen* were held to be of insig-

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6. *Chiazor, supra.*

7. *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980), *cert. denied, sub nom. Romilly v. Amoco Trinidad Oil Co.*, 451 U.S. 920, 101 S.Ct. 1999, 68 L.Ed.2d 312 (1981).

8. *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000, 79 S.Ct. 1138, 3 L.Ed.2d 1030 (1959).

9. *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970).

10. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953).

nificant value in *Rhoditis*. Without an evaluation of the weight to be given each factor in a given case, one would be simply applying the *Lauritzen/Rhoditis* factors mechanically and in a vacuum, contrary to the express instructions of the Court. The Ninth Circuit in *Phillips* and the Fifth Circuit in *Chiazor* and in this case merely recognized that the *Lauritzen/Rhoditis* factors carry different weight in an offshore drilling vessel context, in deciding whether there existed "substantial" contact with the United States to justify application of United States maritime laws.

Chiazor completely controls the disposition of this case. Contrary to the argument of petitioner, there are no significant distinctions between *Chiazor* and this case. The fact that the derrick barge in this case flew the United States flag, whereas the semi-submersible drilling rig in *Chiazor* apparently had no flag or it was not determined, has no significance whatever, because (1) the barge in fact was under bareboat charter to a Panamanian corporation, Oceanic Contractors, Inc., while being operated out of Nigeria, and (2) the flag of the vessel in the context of a case such as this is not significant. Thus, even where a U. S. flag vessel was involved in a similar context, and even when such vessel was owned by a United States corporation, U. S. laws were held not applicable. *Phillips v. Amoco Trinidad Oil Co., supra.* Nor can any distinction be drawn based upon the type of vessel involved. The derrick barge in question is a non-self-propelled, special purpose construction barge used for marine construction in the offshore oil fields. Its status therefore cannot be distinguished from a semi-submersible drilling rig such as that involved in *Chiazor* or *Phillips*. Both types of vessels are stationed on a rather permanent basis in the

areas in which they work, and neither is akin to the merchant vessel plying the waters of the world. Thus, while the law of the flag may assume "cardinal importance" in the traditional merchant vessel case because "there must be some law on shipboard, that . . . cannot change at every change of waters,"[11] it becomes insignificant in the context of an offshore drilling or construction enterprise in which locality is more or less fixed and the element of fortuity is absent.

Petitioner's final arguments raise the specter of discrimination, but fall short of constitutional violations. Petitioner argues that the rule of *Chiazor* and the court below operates to discriminate against foreign offshore workers in favor of United States offshore workers, while the same rule on the other hand operates to discriminate in favor of United States offshore drilling rig owners against United States merchant vessel owners. There is no violation of the Equal Protection Clause in either instance. Neither nationality nor type of industry was arbitrarily the basis for the result in the courts below. On the contrary, nationality of the plaintiff has always been a factor to legitimately consider and weigh in determining substantial contacts, under *Lauritzen* and *Rhoditis*. Further, there are clear and valid reasons for the approach of the Fifth Circuit in *Chiazor* and the court below, and the Ninth Circuit in *Phillips*, with respect to the manner in which competing contacts are weighed and evaluated in the context of an offshore drilling operation, as opposed to the merchant vessel situation, and to ignore such differences would be to sanction a mechanical application of the *Lauritzen* factors, against which the Court cautioned in *Rhoditis*.

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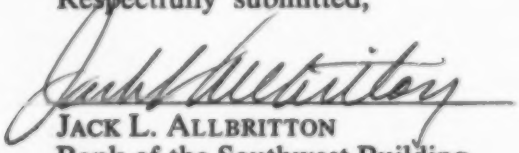
11. *Lauritzen v. Larsen, Id* at 585.

CONCLUSION

The petition for certiorari presents no valid reason why a writ of certiorari should be granted in this case under Rule 17 of the Rules of this Court. There is no conflict among the courts of appeals, nor is there any important question of federal law to be settled by this Court or which has been decided contrary to the decisions of this Court. On the contrary, each and every reason advanced for allowance of a writ of certiorari in this case has been previously addressed and rejected by this Court when it denied certiorari in *Chiazor*. Nothing has changed in the interim to suggest that a writ of certiorari should now be granted on these same points. The petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed to the attorney for Petitioner, Mr. Benton Musslewhite, 1003 Wirt Road, Suite 110, Houston, Texas 77055, by placing same in the United States mail, properly addressed, postage prepaid, certified mail, return receipt requested, this 30 day of April, 1982.

Jack L. Allbritton

JACK L. ALLBRITTON

Appendix

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-77-1604

UGBONE JOHNSON

vs.

J. RAY McDERMOTT & CO., INC.
McDERMOTT OVERSEAS, INC.,
McDERMOTT (NIGERIA) LTD.,
and OCEANIC CONTRACTORS, INC.

MEMORANDUM AND ORDER

Before the Court is the motion to dismiss of defendant J. Ray McDermott & Co., Inc. As grounds for such dismissal McDermott asserts *forum non conveniens.* McDermott sets forth the following facts to support a dismissal:

1. Plaintiff is a Nigerian citizen and resident.
2. The place of the accident was off the coast of Nigeria.
3. Plaintiff signed a contract of employment in Nigeria with McDermott (Nigeria) Limited, a cor-

poration organized and existing under the laws of Nigeria.

4. McDermott (Nigeria) Limited is solely engaged in the business of performing general oil field contract for hire in Africa and its principal place of business is in Lagos, Nigeria. Sixty percent of the stock of McDermott (Nigeria) Limited is owned by McDermott Overseas, Inc., a Panamanian corporation whose principal place of business is in Panama. The remaining forty percent of the stock of McDermott (Nigeria) Limited is owned by Nigerian nationals residing in Nigeria. McDermott (Nigeria) Limited performs no services and sells no products within the United States, nor is it authorized to transact business in any state; the company has never appointed an agent for service of process in any state of the United States. McDermott (Nigeria) Limited maintains no office or place of business in the United States and has no employees, agents, bank accounts or any property of any kind or nature in the United States. McDermott (Nigeria) Limited pays 45% of all of its profits as taxes to the government of Nigeria and pays no taxes of any nature to the United States government.

5. The stock of McDermott Overseas, Inc. is owned 100% by defendant J. Ray McDermott & Co., Inc.

6. The Derrick Barge No. 24, the situs of the accident, is owned by J. Ray McDermott & Co., Inc. and flies the U. S. flag. At the time of the accident in question Derrick Barge No. 24 was under

a bare-boat charter to Oceanic Contractors, Inc., a Panamanian corporation whose principal office and place of business is in Brussels, Belgium.

7. Oceanic Contractors, Inc. is a wholly-owned subsidiary of J. Ray McDermott & Co., Inc., but it only conducts business outside the United States.
8. Plaintiff has sought and obtained relief in Nigeria.
9. Defendant J. Ray McDermott & Co., Inc. maintains and sets forth evidence to show that it is a separate entity from McDermott (Nigeria) Limited, McDermott Overseas, Inc., and Oceanic Contractors, Inc. Plaintiff has failed to rebut such proof.

In making the determination of whether *forum non conveniens* applies the Court can look to the following factors:

1. the choice of law;
2. the ease of access to proof;
3. the availability of compulsory process;
4. the cost of obtaining willing witnesses;
5. the possibility of a view of the premises.

Gulf Oil v. Gilbert, 330 U.S. 501 (1947).

In determining whether American law should apply the Court must apply the due process guidelines set out in *Lauritizen v. Larsen,* 345 U.S. 571 (1953) and *Hellenic Lines, Ltd. v. Rhoditis,* 398 U.S. 306 (1970). These guidelines are to help the Court determine whether sub-

stantial contacts exist with the United States so as to maintain jurisdiction and apply United States maritime law. The factors to be examined in making such determination include:

1. The place of the wrongful act.
2. The law of the ship's flag.
3. The allegiance or domicile of the injured seaman.
4. The allegiance of the shipowner.[1]
5. The inaccessibility of a foreign forum.
6. The place where the shipping articles were signed.
7. The law of the forum.
8. The base of operations of the shipowner.[2]

The place of the wrongful act is Nigeria; the allegiance of the injured seaman is Nigeria; the allegiance of the owner *pro hac vice* is Panama; there is an available foreign forum; the situs of the employment contract is Nigeria; the base of operations of the owner *pro hac vice* is either Brussels, Belgium or Lagos, Nigeria. These fac-

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1. Under a bareboat charter the charterer becomes the owner *pro hac vice* of the vessel and succeeds to all the liabilities of the vessel owner with regard to the seaworthiness of the vessel. *Guzman v. Pichirilo,* 369 U.S. 698 (1962); *Massey v. Williams-McWilliams, Inc.,* 414 F.2d 675 (5th Cir. 1969), *certiorari denied,* 396 U.S. 1037, *remand* 317 F.Supp. 37 (1970). Since we have a bareboat charter the allegiance of the actual shipowner is of small importance. More relevant here is the allegiance of the owner *pro hac vice,* which is Panama.

2. For the reasons set forth in footnote 1 the more relevant base-of-operations "shipowner" is the owner *pro hac vice,* or Oceanic Contractors, Inc., whose base of operations is Brussels, Belguim or Lagos, Nigeria.

tors weigh in favor of the applicability of Nigerian law. Only the law of the ship's flag and the law of the forum, both of which are United States law, support application of United States maritime law. The greater weight of the above-articulated factors favors the application of Nigerian law.

The other factors pertinent to the *forum non conveniens* determination further point to the inappropriateness of this forum. The proof lies in Nigeria; compulsory process for those witnesses in Nigeria is unavailable; the cost of bringing the witnesses to Houston, Texas is prohibitive; and there is very little possibility of viewing the Derrick Barge No. 24 here. Therefore, it is ORDERED that defendant J. Ray McDermott & Co., Inc.'s motion to dismiss on grounds of *forum non conveniens* is granted and J. Ray McDermott & Co., is hereby DISMISSED as a defendant in this suit.

Signed this 22nd day of August, 1979.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 77-1604

UGBONE JOHNSON

vs.

J. RAY McDERMOTT & COMPANY, INC.,
McDERMOTT OVERSEAS, INC.,
McDERMOTT (NIGERIA) LTD. and
OCEANIC CONTRACTORS, INC.

MEMORANDUM AND ORDER

Before this Court are Defendants McDermott Overseas, Inc., McDermott (Nigeria) Ltd., and Oceanic Contractors, Inc.'s Motion to Dismiss for lack of *in personam* jurisdiction under Rule 12(b) Fed. R. Civ. P. Also before this Court is Defendant J. Ray McDermott & Company, Inc.'s Motion to Dismiss under the doctrine of *forum non conveniens.*

Plaintiff, Ugbone Johnson, a Nigerian citizen, brings Jones Act and general maritime claims under this Court's maritime and diversity jurisdiction. The Defendants in this case are J. Ray McDermott & Company, Inc.

(JRMc), a Delaware corporation with its principal place of business in New Orleans, Louisiana and its following subsidiaries: McDermott Overseas, Inc. (MOI), a Panamanian corporation wholly owned by JRMc; McDermott (Nigeria) Ltd. (MNL), a Nigerian corporation, sixty percent of which is owned by MOI and forty percent of which is owned by Nigerian nationals; and Oceanic Contractors, Inc. (OCI), a Panamanian corporation wholly owned by JRMc.

At the time of the incident made the basis of this lawsuit, Plaintiff alleges that he was a seaman aboard the vessel, "Derrick Barge 24", in the waters off the coast of Nigeria. While working on the barge, on or about August 19, 1976, Plaintiff claims that he was injured when he became entangled in ropes and was pulled into the air above the deck. The "Derrick Barge 24" is owned by JRMc and flies the U. S. flag; however, at the time of the accident in question, it was under a bareboat charter to OCI. Plaintiff subsequently received Worker's Compensation benefits under the laws of Nigeria; however, he brings his action to recover for injuries received for the alleged negligence of the Defendants under the Jones Act, 46 U.S.C. § 688, and under general maritime law.

Defendants MNL, MOI and OCI assert that this Court lacks *in personam* jurisdiction over them, since they are foreign corporations. It is well settled that for jurisdiction over foreign corporations to exist, a two-part test must be met. Each defendant must be amenable to service under the state law of the forum, and if the service is proper, then federal law must be applied to insure that the assertion of jurisdiction comports with constitutional

due process. *Jetco Electronics Industries, Inc. v. Gardiner,* 473 F.2d 1228, 1232 (5th Cir. 1973). Plaintiffs are charged with the burden of proof in showing that jurisdiction is proper in this Court. *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 490 (5th Cir. 1974).

Service in this case was attempted under the Texas long-arm statute, which provides that service may be made on foreign corporations "doing business" in Texas through the Secretary of State. Tex. Rev. Civ. Stat. Ann. art. 2031b, § 3 (Vernon 1964).[1] Doing business in Texas is defined by the statute to include a contractual relationship, in whole or part, undertaken within the state or the commission of a tort, in whole or part, in the state. Tex. Rev. Civ. Stat. Ann. art. 2031b, § 4 (Vernon Supp. 1980).[2] This cause of action is based upon an alleged tort. While it is clear that the whole wrongful act does not have to occur in Texas for purposes of article 2031b, at least part of the tort must arise there. *Eyerly Aircraft Co. v. Killian,* 414 F.2d 491 (5th Cir. 1969). Similarly, if the business venture from which the tort arose was designed to derive financial gain from the State of Texas,

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1. The statute provides in pertinent part:
Any foreign corporation . . . that engages in business in this state . . . and does not maintain a place of regular business in this state or a designated agent upon whom service may be made upon causes of action arising out of such business done in this state, the act or acts of engaging in such business within this state shall be deemed equivalent to an appointment . . . of the Secretary of State of Texas as agent upon whom service of process may be made. . . .

2. The statute provides in pertinent part:
any foreign corporation . . . shall be deemed doing business in this state by entering into contract by mail or otherwise with a resident of Texas to be performed in whole or in part by either party in this state, or the committing of any tort in whole or in part in this state.

then business is being done in the state for purposes of the statute. *Wilkerson v. Fortuna Corp.*, 554 F.2d 745, 748 (5th Cir. 1977). The present case arises out of a maritime tort occurring off the coast of Nigeria, in which the plaintiff complains of negligence under the Jones Act and unseaworthiness of the vessel under general maritime law. No part of the tort is alleged to have taken place in the State of Texas. Moreover, the business of the Plaintiff's direct employer, MNL, or its parent corporation was not designed to benefit directly from Texas citizens. On the contrary, jurisdictional discovery has shown that the primary purpose of the "Derrick Barge 24" was to explore for minerals under the waters off of Nigeria. If there exists an affected economic interest, that interest is Nigeria's not Texas'.[3]

Plaintiff advances an alter ego argument, claiming that proper *in personam* jurisdiction over the parent corporation, JRMc, may be imputed into its subsidiaries. *See Reul v. Sahara Hotel*, 372 F. Supp. 995 (S.D. Tex. 1974). This Court will not quickly disregard separate corporate entities at the mere incantation of the term "alter ego". Plaintiff must show that the parent corporation so totally dominates the subsidiary, that the subsidiary manifests no separate corporate interests of its own and functions solely to achieve the purposes of the parent corporation. *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.*, 483 F.2d 1098, 1106 (5th Cir. 1973). Complete ownership by the parent of its subsidiary does not warrant disregarding the corporate separateness of the entities, *DeMateos v. Texaco*, 562 F.2d 895, 902 (3rd

3. In fact, the record reflects that almost the entire work force of MNL, the Plaintiff's employer, was comprised of Nigerian citizens. *See* Ashbaugh affidavit; Davis Depo. at 191-94.

Cir.), *cert. denied*, 435 U.S. 904 (1977); moreover, the utilization of a common name, identity of officers or joint advertising literature by separate corporations does not necessarily unite the two corporations for all purposes. *See e.g., Overstreet v. Southern Railway Co.*, 371 F.2d 411, 412 (5th Cir.), *cert. denied*, 387 U.S. 912 (1967); *Turner v. Jack Tar Grand Bahama Ltd.*, 353 F.2d 954, 956 (5th Cir. 1965).

In the present case, as exhibited by sworn affidavits and jurisdictional discovery on file, it is apparent that while MOI, MNL, and OCI were all subsidiaries of JRMc, they maintained separate corporate existence and purpose. *See* Davis Depo. pp. 70-119. Furthermore, this Court finds a dearth of control over the day-to-day operations of the subsidiaries by the parent corporation, JRMc, and this lack of control tends to negate any inference of alter ego. *See Coles v. Humble Oil and Refining Company*, 348 F. Supp. 1240, 1243 (S.D. Tex. 1972); Davis Depo. pp. 195-96. Thus, this Court concludes that JRMc is a true multi-national corporation with foreign subsidiary corporations and that JRMc's control over its subsidiaries, while substantial, is insufficient to impute *in personam* jurisdiction over the subsidiaries.

Therefore, it is the opinion of this Court that Plaintiff has failed to show how MNL, MOI or OCI were doing business in Texas, for purposes of the Texas long-arm statute, and has failed to meet the first part of the jurisdictional test. Because of this, the due process prong of the analysis need not be reached, and the foreign corporate defendants, MNL, MOI and OCI, are dismissed for lack of *in personam* jurisdiction.

By order of this Court dated August 22, 1979, Plaintiff's cause of action against JRMc was dismissed under the doctrine of *forum non conveniens.* This order was subsequently set aside to allow further jurisdictional discovery. The additional discovery that has been made has not persuaded this Court that its earlier Memorandum and Order was incorrect, and it is hereby reinstated and incorporated into this Memorandum and Order. Therefore, that part of Plaintiff's cause of action against J. Ray McDermott & Company, Inc. is dismissed under the doctrine of *forum non conveniens.*

It is therefore ORDERED, ADJUDGED and DECREED that Defendants McDermott Overseas, Inc., McDermott (Nigeria) Ltd., and Oceanic Contractors, Inc.'s Motion to Dismiss is hereby GRANTED and Plaintiff's Complaint as it pertains to them is DISMISSED for lack of *in personam* jurisdiction.

It is further ORDERED that this Court's Memorandum and Order dated August 22, 1979 is hereby reinstated and Defendant J. Ray McDermott & Company, Inc.'s Motion to Dismiss is GRANTED and that part of Plaintiff's Complaint against J. Ray McDermott & Company, Inc. is DISMISSED under the doctrine of *forum non conveniens.*

Signed this 13th day of November, 1980.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 80-2378

Summary Calendar

UGBONE JOHNSON,
Plaintiff-Appellant,

v.

McDERMOTT OVERSEAS, INC., ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(October 16, 1981)

Before CHARLES CLARK, Chief Judge, RUBIN and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

Ugbone Johnson appeals from the district court's order dismissing J. Ray McDermott & Co. on the grounds of

forum non conveniens and dismissing McDermott (Nigeria) Limited, McDermott Overseas, Inc. and Oceanic Contractors, Inc. for lack of personal jurisdiction. We affirm.

Johnson, a Nigerian citizen, was employed by McDermott (Nigeria) Limited (MNL), a Nigerian corporation, to work on a barge stationed off the coast of Nigeria. The barge was owned by J. Ray McDermott & Co. (McDermott), a Delaware corporation, and flew the American flag. The barge was, however, bareboat chartered to Oceanic Contractors, Inc. (Oceanic), a Panamanian corporation. Oceanic is a wholly owned subsidiary of McDermott. Sixty percent of the stock of MNL is held by McDermott Overseas, Inc. (MOI), a Panamanian corporation, which is in turn a wholly owned subsidiary of McDermott.

The case arose when the appellant broke his leg while working for MNL on McDermott's barge. Appellant initially brought suit against McDermott in the District Court of Texas under the Jones Act and the general maritime law. When McDermott moved to dismiss the case on the ground of *forum non conveniens,* the appellant amended his complaint to include MNL, MOI and Oceanic as defendants.

The district court granted McDermott's motion to dismiss the suit against it on the grounds of *forum non conveniens.* The court found that under the tests articulated in Lauritzen v. Larsen, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953), and Hellenic Lines v. Rhoditis, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970), American law should not be applied to the appellant's claim. The court reasoned that:

> [t]he place of the wrongful act in Nigeria; the allegiance of the injured seaman in Nigeria; the allegiance of the owner *pro hac vice* [Oceanic] is Panama; there is an available foreign forum; the situs of the employment contract is Nigeria; the base of operations of the owner *pro hac vice* is either Brussels, Belgium or Lagos, Nigeria. . . . Only the law of the ship's flag and the law of the forum, both of which are United States law, support application of United States maritime law. The greater weight of the above articulated factors favors the application of Nigerian law.

The court further found that (1) the proof of the case was in Nigeria, (2) transporting the witnesses from Nigeria would be prohibitively expensive, and (3) compulsory process over Nigerian witnesses was unavailable. Based on these findings the suit against McDermott was dismissed.

The appellant contends that in considering the "base of operations," a factor used in determining the applicable law, the district court should have focused on McDermott, the owner of the barge, rather than Oceanic, the bareboat charterer. Appellant argues that if the court had considered McDermott's operations, it would have found that American law applied and would have retained jurisdiction. *See Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1018 (5th Cir. 1981). We disagree.

In *Chiazor*, this court recently affirmed the trial judge's dismissal, for *forum non conveniens*, of a suit whose facts are almost identical to those in the present case. In *Chiazor*, as in this case, a Nigerian citizen had been employed by a Nigerian corporation, which was also a subsidiary of an American corporation. The plaintiff had signed a contract in Nigeria and had been injured while working

on a vessel stationed off the Nigerian coast. The court in *Chiazor* found that even if the base of operations were considered to be that of the American parent rather than that of the foreign subsidiary, American law should not be applied. Thus, even if we accepted appellant Johnson's argument that the true base of operations in this case was the United States, *Chiazor* still requires us to affirm the district court's dismissal of McDermott.[1]

The appellant also contends that the district court erred in dismissing MNL, MOI and Oceanic for lack of personal jurisdiction. We need not reach this contention. When MNL, MOI and Oceanic initially moved to dismiss the complaint against them, they contended that the court lacked personal jurisdiction and, alternatively, that the complaint should be dismissed for *forum non conveniens.* The district court did not reach the issue of *forum non conveniens* because it found that it lacked sufficient contacts to assert jurisdiction over the defendants. Because the position of MNL, MOI and Oceanic is the same as that of McDermott, we affirm the trial court's dismissal on the ground of *forum non conveniens.* The District Court in Texas is an improper forum for the foreign subsidiaries, MNL, MOI and Oceanic just as it is for McDermott, their American parent.

AFFIRMED.

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1. *Castanho v. Jackson Marine, Inc.*, 650 F.2d 546 (5th Cir. 1981) (per curiam) does not require a different conclusion. In *Castanho,* when the trial court denied the defendant's motion to dismiss for *forum non conveniens,* the defendant sought review of the trial court's decision by a writ of mandamus. Thus, the issue before this court in *Castanho* was not simply whether the trial court had abused its discretion but whether there was such an abuse of discretion that mandamus should issue. Not only was the issue in *Castanho* different from that in *Chiazor,* but each case also reflects the latitude which this court has accorded the discretion of the trial judge in deciding whether to grant or deny such a motion.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-1701

UGBONE JOHNSON,
Petitioner

v.

J. RAY McDERMOTT & COMPANY, INC.,
McDERMOTT (NIGERIA), LTD.,
McDERMOTT OVERSEAS, INC.
and
OCEANIC CONTRACTORS, INC.,
Respondents

REPLY BRIEF OF PETITIONER IN RESPONSE TO RESPONDENTS' BRIEF AND OPPOSITION TO PETITION FOR CERTIORARI

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SUBJECT INDEX

Page

Questions Presented

I. The controlling question here is whether, in view of Lauritzen v. Larsen, 345 U.S. 521 (1953) and Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), it would ever be appropriate, at the pre-trial stage, in Jones Act (46 U.S.C. 688) cases filed in U.S. district courts by Plaintiffs injured on American owned and American flagged vessels, with charterers who have their base of operations in the United States, to rule as a matter of law that the contacts with the United States are not substantial enough to justify the application of United States law, as was done by the district court and court of appeals in this case 1

II. Denial of certiorari in Phillips and Chiazor not controlling of consideration of certiorari here 5

III. The argument by Respondents that there is no conflict between the Third circuit and the Fifth circuit with respect to the applicability of Rule 56 to Choice-of-Law determinations at the pre-trial stage simply does not face up to the reality that the district court in this case resolved disputed fact

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issues relevant to the choice-of-law determination in derogation of Rule 56. 12

IV. The argument of Respondents that the choice-of-law decision can be made by balancing the Lauritzen-Rhoditis factors, rather than by simply deciding whether the contact with the United States are substantial, is directly contrary to Rhoditis and Bartholomew 17

CONCLUSION 19

LIST OF AUTHORITIES

Addickes v. S. H. Kress and Co., 398 U.S. 144, 158-159 (1970) . . . 16

Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307 (2nd Cir. 1976) 7,19

Bartholomew v. Universe Tankships, Inc., 263 F.2d 432 (2nd Cir. 1959) cert. den. 359 U.S. 1000 . 5,17,18, 19,20

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NO. 81-1701

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UGBONE JOHNSON,
Petitioner

v.

J. RAY McDERMOTT & COMPANY,
INC., ET AL,
Respondents

REPLY BRIEF OF PETITIONER IN RESPONSE TO RESPONDENTS' BRIEF AND OPPOSITION TO PETITION FOR CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully submits this Reply Brief in Response to Respondents' Brief and Opposition to Petition for Certiorari, and would respectfully show as follows:

I.

The Controlling Question Here Is

Whether, in View of Lauritzen v. Larsen, 345 U.S. 521 (1953), and Hellenic Lines v. Rhoditis, 398 U.S. 306 (1970), It Would Ever Be Appropriate, At The Pre-Trial Stage, In Jones Act (46 U.S.C. 688) Cases Filed In U.S. District Courts By Plaintiffs Injured On American Owned and American Flagged Vessels, With Charterers Who Have Their Base of Operations In The United States, To Rule As A Matter of Law That The Contacts With The United States Are Not Substantial Enough To Justify The Application of United States Law, As Was Done By The District Court And Court of Appeals In This Case.

The undisputed facts here are that Ugbone Johnson was injured while he was a seaman on an American flagged and American owned vessel. In addition, the court of appeals assumed arguendo that the base of operations

in this case was the United States.[1/]

It is further undisputed that the bare-boat charter on the vessel (between the American parent, McDermott, and Panamanian subsidiary, Oceanic) provided that it would be "governed by . . . the General Maritime Laws of the United States". Moreover, all of the supervisory personnel on the vessel were domiciled Americans, on the payroll of non-Nigerian subsidiaries of McDermott. The proceeds from the vessel's use ended up in United States bank accounts and most of the operating expenses of the vessel emanated from United States bank accounts. It is further undisputed that the law of Nigeria provided for only a very minimum workmen's compensation recovery in Nigeria. Moreover, neither the owner, McDermott, nor the alleged operator, Oceanic, were amenable to

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[1/] The court of appeals stated:
". . . (E)ven if we accepted appellant Johnson's argument that the true base of operations in this case was the United States, Chiazor still requires us to affirm the district court's dismissal of McDermott." (see App. 2).

process in Nigeria. And lastly, the vessel in this case was a derrick barge which moved about constantly upon the ocean waters, and from ocean to ocean, as distinguished from the semi-submersible rig in Chiazor v. Transworld Drilling Co., 648 F.2d 1015 (5th Cir. 1981) cert. den. 50 U.S.L.W. 3765 (March 22, 1982), and Phillips v. Amoco Trinidad Oil Co., 632 F.2d 82 (9th Cir. 1980) cert. den. sub. nom. Romilly v. Amoco Trinidad Oil Co., 451 U.S. 920 (1981), which virtually remained in a fixed position in the territorial waters of the host nation (see discussion under II-C, infra).

With all these undisputed contacts with the United States, how can there be the slightest doubt that they are substantial[2/] enough to mandate the application of U.S. law?

2/ As we pointed out in our original petition (para. III and argument at pp. 46-49 of original petition), Phillips and Chiazor incorrectly utilized a "comparison", "balancing" or "preponderance" test in deciding the choice-of-law question, in direct contradiction to the "substantiality" test mandated by this Court in

II.

Denial Of Certiorari In Phillips And Chiazor Not Contrlling of Consideration of Certiorari Here.

A. While Phillips involved an American flagged and American owned vessel, when it was before the Court previously on petition for certiorari, the district court and court of appeals had only ruled on the choice-of-law question and had not ruled on the forum non conveniens motion. The district court had granted an interlocutory appeal solely on the question of choice-of-law (632 F.2d at p. 83). We hope we are correct in assuming that the primary reason this Court denied certiorari in Phillips was because the controversy had not been finally decided in the American court.[3/] Thus, the denial of

2/ (continued)
Hellenic Lines v. Rhoditis, 345 U.S. 571 (1953), adopting the test as described by Judge Medina in Bartholomew v. Universe Tankships, Inc., 263 F.2d 432 (2nd Cir. 1959) cert. den. 359 U.S. 1000 (see discussion, para. IV, infra).

certiorari in Phillips should not be construed as approving the Ninth circuit's radical new concept that the historic controlling weight given to the flag and the ownership of the vessel in choice-of-law determinations[4] does not apply to semi-submersible rigs.

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[3] The district court has since granted the forum non conveniens motion and appeal of that final action is presently pending in the Ninth circuit court of appeals.

[4] The historic rule is forcefully explained in Lauritzen. Mr. Justice Jackson, speaking for the Court, stated:

> "Law of the Flag - Perhaps the most venerable and universale rule of maritime law relevant to our problem (of choice-of-law) is that which gives cardinal importance to the law of the flag.
>
> "This Court has said that the law of the flag supersedes the territories principle . . . because it 'is deemed to be a part of the territory of that sovereignty (whose flag it flies), and not to lose that character when in navigable waters within the territorial limits of another sovereignty.'
>
> "It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law." (73 S.Ct. at pp. 929, 930).

Also see Gilmore & C. Black, The Law of Admiralty 477 (2nd Ed., 1975); 2 M. Norris, The Law of Seamen, Sec. 684

B. In Chiazor, the vessel flew no flag and was owned by a foreign subsidiary. It was not like this case, wherein it is undisputed that the vessel is American flagged and American owned, thus invoking the principles of floating American sovereignty and estopped from avoiding U.S. law. While we did concede in our original petition that there are some similarities between this case and Chiazor, we did point out the vital distinctions concerning the flag and ownership (see pp. 59, 60 of original petition).

4/ (continued)
(3rd Ed. 1970). Furthermore, as stated in Carlson, The Jones Act and Choice of Law, Vol. 15, International Lawyer 48:

> "Application of the Jones Act to any seaman aboard a vessel flying an American flag is beyond doubt. Some courts have said that a defendant owning a vessel registered in this country is estopped from claiming that United States law does not apply to its affairs . . . vessels completely owned by Americans are (also) easy cases. Courts will infer control of the vessel from its complete ownership." (Emphasis ours; 15 Int. Lawyer, 60-63; citing Bartholomew; Moncada v. Lemuria Shipping Corp., 491 F.2d 470, 2nd Cir. 1974; and Antypas v. Cia Maritima San Basilio, S.A., 541 F.2d 307, 2nd Cir. 1976).

Thus, Chiazor cannot stand for an approval by this Court of the grossly inequitable, if not unconstitutional, concept that the owners of vessels utilized in a small segment of the maritime industry (offshore drilling vessels) should somehow be especially privileged to escape their responsibilities under American law even though such vessels are American owned and American flagged, and their base of operations is in the United States.[5/]

5/ Respondents argue that no weight should be given to American ownership because the vessel was bareboat chartered in this case to a Panamanian subsidiary. However, the court of appeals assumed arguendo that the base of operations was in the United States and Rhoditis explains the importance and the significant weight that should be given to the base of operations of the "owner" (whether it be owner pro hac vice or just owner) (398 U.S. at p. 309). Moreover, it is undisputed that the bareboat charter in this case called for the application of "the maritime law of the United States" and that the charterer's base of operations was indeed in New Orleans, where its principal officers and directors, all Americans, officed and directed the affairs of the corporation.

C. Both Phillips and Chiazor are distinguishable from the instant case because they both involved basically stationary semi-submersible rigs, whereas this case involves an almost constantly moving derrick barge. The courts in Phillips and Chiazor explained their new concept as follows:

> "(The Lauritzen-Rhoditis) rationale does not apply to a drilling vessel whose operations are at a fixed location." (Emphasis ours; 632 F.2d at p. 87).

The derrick barge in this case moved from ocean to ocean in international waters (having, for example, moved from Brazilian waters to international waters offshore Nigeria just two years before the accident in question) and it constantly moved from place to place within the general area of international waters within which it was working.[6/]

6/ It moves from rig to rig, platform to platform, from one job requiring its temporary use to another; the derrick barge does not drilling for oil at fixed places; its equipment and derricks are utilized in the construction of offshore production platforms, pipelines and

The derrick barge is much like the supply boat in Castanho v. Jackson Marine Corp., 484 F.Supp. 201 (E.D. Tex, 1980) mand. den. 650 F.2d 546 (5th Cir. 1981) second decision Nov. 13, 1981 (unpublished), Cause No. B-79-437-CA, E.D. Tex., Beaumont Division (opinion attached as Appendix 10), which Judge Fisher found to be outside the scope of the Phillips-Chiazor rule and rationale.[7/]

If this Court is going to sanction the Phillips-Chiazor rationale, which, in view of its tremendous impact upon the venerable precepts of Lauritzen and Rhoditis, we cannot believe this Court would do without granting certiorari and giving the matter a full hearing, then where is this Court, or any court, going to draw the line?[8/]

6/ (continued)
the like; it traditionally takes a relatively short time to finish one job before it moves on to another.

7/ Judge Fisher stated:
"In Chiazor, the vessel was a submersible drilling rig. In the present case, the vessel is a supply boat. The Court does not have sufficient evidence before it to determine whe-

It would seem the better rule, since the issue at hand is whether the liberally construed Jones Act is to

7/ (continued)
ther the AMERICAN MOON is a true maritime vessel, although it appears that it is." (p. 3 of original petition; emphasis ours).

8/ As we stated in our original petition (pp. 61, 62):
"This case points up the unworkability of the radical new rule announced in Chiazor . . . because how do potential parties to these lawsuits know, and how do any other courts know, where to draw the line - that is, which vessels fall within the Chiazor rule and which vessels do not? Does the rule include vessels which transport supplies or personnel to oil drilling vessels (such as crewboats and supply boats); does it include surveying vessels; does it include pipelaying vessels; does it include vessels used to maintain, repair or construct offshore facilities; and does it include diving vessels? While all of these vessels are utilized in various direct and indirect ways to support offshore drilling, they are all classic vessels constructed, generally speaking, like blue water vessels; they move all over the world from one drilling area to another. It is clear that the Chiazor rule will result in nothing but judicial confusion, and for that reason alone, should be rejected."

narrowly limit the Phillips-Chiazor rule to those rigs and production platforms which, as stated in Phillips, virtually remain at "a fixed location". The barge simply does not remain at "a fixed location".

III.

The Argument By Respondents That There Is No Conflict Between The Third Circuit And The Fifth Circuit With Respect To The Applicability Of Rule 56 To Choice-Of-Law Determinations At The Pre-Trial Stage Simply Does Not Face Up To The Reality That The District Court In This Case Resolved Disputed Fact Issues Relevant To The Choice-Of-Law Determination In Derogation Of Rule 56.

The Respondents argue that there is no reviewable procedural conflict between Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3rd. Cir. 1980), which holds that Rule 56, F.R.C.P. (summary judgment rule) applies to choice-of-law deter-

minations at the pre-trial stage, and this case and Chiazor, which hold that the district court should utilize its "discretion" to resolve any disputed issues relevant to a choice-of-law determination at the pre-trial stage,[9] simply because, say the Respondents, "(I)n both Chiazor and this case, the courts below determined from the undisputed material facts that Nigerian law should apply rather than United States law" (pp. 5,6, Respondents' brief).

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[9] The Respondents shock us with the statement that there is nothing in the court of appeals decision in Chiazor or this case to indicate "that the courts below applied a rule of discretion to the choice-of-law analysis." (p. 6, Respondents' brief). The district court in this case made several factual findings and the court of appeals did not mention Rule 56, or undertake to determine whether there existed any questions of material fact. The district court in Chiazor never mentioned choice-of-law and obviously lumped the two determinations together and used its discretion to resolve both. The court of appeals held that the proper standard of review of the district court's determinations (forum non conveniens and choice-of-law) was whether the district court's decision "constituted a clear abuse of discretion" (648 F.2d at 1017).

The court of appeals in this case affirmed a district court decision that contained several factual findings. The district court found that the relevant "allegiance of the owner pro hac vice (Oceanic) . . . is Panama" and that "the base of operations of the owner pro hac vice is either Brussels, Belgium, or Lagos, Nigeria." (p. 4 of opinion of court dated Aug. 22, 1979). Yet, the Petitioner produced evidence that Oceanic had no operating office in Panama, merely a corporate agent; that it had only a regional office in Brussels and no office, officer, assets or agent for service in Nigeria, and that in fact its home office and place from where it managed its affairs was New Orleans, where nearly all of its officers and board members lived and worked.

The Respondents admit that the place from where "the day-to-day operations of the barge were directed" was a relevant issue to the choice-of-law determination (p. 7, Respondents' brief), but audaciously state that

such issue was also undisputed, yet the supervisory personnel on the vessel were the employees of Oceanic and MCI, both of which were managed out of New Orleans and had no office in Nigeria. One of the central issues in this case, vis-a-vis the choice-of-law determination, is just what type of an office the Respondents maintained in Nigeria: was it, as the Respondents contended, a bona fide regional office from where all of McDermott's and the vessel's activities were directed or was it, as Petitioner demonstrated by voluminous documents and testimony, simply a personnel office with no real assets or authority to "direct" or manage anything but there simply to constitute a "presence" sufficient to comply with Nigerian law and to act as conduit through which the required number of Nigerian laborers could be hired. This was a central fact issue in this case and it was indeed hotly disputed whether the "day-to-day operations" of Derrick Barge 24 were

directed from Nigeria.

Thus since, as we explained in our original petition (at pp. 26-35), for the reasons so well elucidated in Chirinos de Alvarez, Rule 12(b) requires that Rule 56 procedures must be utilized in choice-of-law determinations,[10] the Respondents could not be more wrong than they are in attempting to lightly sweep aside the sharp conflict between the Fifth circuit court of appeals in Chiazor and this case and the Second circuit court in Chirinos de Alvarez by simply saying that all of the fact issues are undisputed.

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[10] The Court in Chirinos stated:

> "The District Court stated that therefore 'the controlling question is whether the Jones Act and the United States general maritime law' are applicable. Thus, the District Court's decision was principally concerned with whether the Plaintiffs were entitled relief under United States law, and as such, it was in the nature of a decision on a motion for summary judgment. Therefore, all factual disputes and inferences are to be resolved favorably for the Plaintiffs. Addickes v. S. H. Kress and Co., 398 U.S. 144, 158-159 (1970); Wright, Law of Federal Courts, Sec. 99 (2nd Ed., 1970)." (613 F.2d at pp. 1343-1344).

Several of the critical issues are obviously very much in dispute. This Court urgently needs to resolve this Third circuit-Fifth circuit conflict, because until it does, confusion and inequity will reign.[11/]

IV.

The Argument Of Respondents That The Choice-Of-Law Decision Can Be Made By Balancing The Lauritzen-Rhoditis Factors, Rather Than By Simply Deciding Whether The Contacts With The U.S. Are Substantial, Is Directly Contrary To Rhoditis And Bartholomew.

The Respondents argue (p. 9) that there are "clear and valid reasons" for the balancing approach employed in Phillips and Chiazor but they do not explain what those clear and valid reasons are. They apparently base their reationale on these comments in Phillips:

11/ See the example given of the three cases (including this one) discussed at p. 25 of original petition, and see Appendices 1A, 1B, 7 and 8 to original petition.

> "Substantiality is a relative term, and Lauritzen requires that we compare the substantiality of our interest in a given transaction with that of other nations. In defining 'the domain which each nation will claim as its own', we are instructed to valud 'points of contact between the transaction and the states or governments whose competing laws are involved.' Lauritzen v. Larsen, supra, 345 U.S. at 582, 73 S.Ct. at 928 (emphasis added) . . . .
>
> "This is a comparative, and not an absolute, evaluation." (632 F.2d at p. 86).

On the basis of this rationale, also employed in both this case and Chiazor, the Ninth and Fifth circuits held, directly contrary to Rhoditis and Bartholomew (see pp. 46-49 of original petition),[12/] that the greater weight of the contacts were with Trinidad and Nigeria and therefore the law of Trinidad and Nigeria respectively applied in those cases.

12/ The Rhoditis and Bartholomew test is, as we pointed out in our original petition, aptly described by Carlson:

> ". . . as soon as a substantial contact is found, a Court should stop its deliberations and proceed to apply the Jones Act to the case before it . . . a judge using the Bartholomew test need only consider each fact or group of facts constituting an American contact with the transaction to determine whether

CONCLUSION

The statements by Respondents that "(t)here is no conflict among the court of appeals and that there is no question of law decided contrary to the decisions of this Court", with reference to the issues in this case, are outrageously inaccurate. Indeed, there is direct conflict between the Supreme Court and the Second circuit (Lauritzen, Bartholomew, Rhoditis, Antypas and Moncada) and the Ninth and Fifth circuits (Phillips and this case) concerning the weight to be given to flag and ownership of the vessel; there is direct conflict between the Third circuit (Chirinos de Alvarez) and the Fifth circuit (Chiazor and this case) as to whether Rule 56 applies in choice-of-law determinations at the pre-trial stage; and there is direct conflict between the Supreme Court and the Second circuit (Rhoditis and Bartholomew) and the

12/ (continued)
that contact is substantial; if no single contact is substantial, the judge must then decide whether the aggregate of insubstantial contacts adds up to the necessary substantiality. No balancing at all

Ninth and Fifth circuits (Phillips, Chiazor and this case) with reference to whether the courts should apply the substantiality test or the balancing test in resolving the choice-of-law question.

The Respondents then state that there are no "important question(s) of federal law to be settled by this Court". How can the Respondents sincerely argue that whether the court of appeals in this case and Phillips were correct in formulating the radical new concept that, as a matter of law, American law does not apply to an American flagged and American owned semi-submersible rig just because, though it is admittedly a "vessel", it remains in one location for long periods of time, is not an important question of federal law? It is important for all the constitutional reasons we discussed in our original petition and because, if this Court does not deal with this new concept, the

12/ (continued)
occurs in the Bartholomew test." (15 International Lawyer at p. 42, emphasis ours).

door will surely be open to an attritional emasculation of the Jones Act.

We pray the certiorari be granted and upon argument that this cause be reversed and remanded with instructions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 1982, three true and correct copies of the above and foregoing Brief were sent to Jack Allbritton, of Fulbright & Jaworski, Bank of the Southwest Building, Houston TX 77002, attorney for Respondents, by United States mail, postage prepaid.

Benton Musslewhite